

No. 16063 ✓

United States
Court of Appeals
For the Ninth Circuit

MONOLITH PORTLAND CEMENT COMPANY,
a Corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

UNITED STATES OF AMERICA,

Appellant,

vs.

MONOLITH PORTLAND CEMENT COMPANY,
a Corporation,

Appellee.

Transcript of Record **FILED**

JAN - 9 1958

PAUL P. O'BRIEN; CLERK

Appeals from the United States District Court for the
Southern District of California
Central Division

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Appeals from the United States District Court for the
Southern District of California
Central Division

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	PAGE
Answer to Complaint.....	13
Answer to Amended Complaint.....	53
Answer to Supplement to Complaint.....	49
Amendment to Complaint to Conform to Proof	47
Attorneys, Names and Addresses of.....	1
Certificate by Clerk.....	141
Complaint	3
Ex. A—Statement Made for Claim for Re- fund	11
Defendant's Proposed Amendments to Proposed Findings of Fact and Conclusions of Law, Lodged by Defendant on April 4, 1958	54
Exhibits, Plaintiff's:	
No. 3—Ex. H, Engineer's Report.....	113
5—Computation of Depletion Allow- ance	117
14—Limestone and Dolomite Informa- tion Circular No. 7738	119
15—California State Division of Mines Bulletin No. 176, Reports Upon Limestones, Dolomite and Lime Products	120

Exhibits, Plaintiff's—(Continued):	
23—Deposition of Dr. Oliver Bowles..	122
29—Computation of Allowable Depletion for Year 1951.....	139
31—Statement Showing Shipments in Bulk and Sacks and Per Cent of Each, 1951 to 1957.....	140
33—Computation of Allowable Depletion for Year 1951.....	140
Findings of Fact, Conclusions of Law and Judgment	62
Minute Entries:	
August 2, 1957.....	42
March 21, 1958.....	46
March 24, 1958.....	51
Notice of Appeal, Defendant's	75
Notice of Appeal, Plaintiff's	73
Notice of Entry of Judgment.....	52
Order Denying Defendant's Motion to Amend Defendant's Proposed Findings of Fact and Conclusions of Law in Accordance With Defendant's Proposed Amendments, Filed on April 9, 1958	61
Order on Motions Re Extending Time and Printing of Record.....	150
Statement of Points on Appeal, Monolith Portland Cement Co.....	147

INDEX

PAGE

Statement of Points on Appeal, United States of America	148
Stipulation of Facts No. 1.....	16
Stipulation of Facts No. 2.....	27
Stipulation of Facts No. 3.....	40
Supplement to Complaint for Refund of Taxes Paid	43
Transcript of Proceedings	76
Witnesses:	
Gillette, Waldo A.	
—direct	106
—cross	109
Neuhauser, William E.	
—direct	77
—cross	91
Pilkenton, Kenneth H.	
—cross	110

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United States District Court, Southern
District of California, Central Division

No. 20256—WM

MONOLITH PORTLAND CEMENT COMPANY,
a Corporation,

Plaintiff,

vs.

UNITED STATES OF AMERICA, and R. A.
RIDDELL, DISTRICT DIRECTOR OF IN-
TERNAL REVENUE, LOS ANGELES DIS-
TRICT,

Defendants.

COMPLAINT FOR REFUND OF TAXES PAID

Plaintiff complains of defendants and each of
them, and alleges:

I.

That the above-named United States District
Court has jurisdiction of this cause of action under
and pursuant to Title 28, United States Code, Sec-
tion 1346(a)(1).

II.

That R. A. Riddell resides within the venue of the
Central Division of this Court and is the duly ap-
pointed and acting District Director of Internal
Revenue, Los Angeles District. That during the year
1951 and until January 1, 1953, R. A. Riddell was
the Collector of Internal Revenue for the Sixth Dis-
trict (Los Angeles) of California when, under the
Reorganization Plan of November 26, 1952, he be-

came the Director of Internal Revenue, Los Angeles District, and on July 20, 1953, he became and now is the District [2*] Director of Internal Revenue, Los Angeles District.

III.

That at all times herein mentioned, the plaintiff, Monolith Portland Cement Company, was and now is a corporation duly qualified to conduct and is conducting business in the state of California, with its principal office in the City of Los Angeles, State of California. That the taxes which were assessed and paid as herein alleged were paid to the District Director of Internal Revenue, Los Angeles District, Los Angeles, California.

IV.

That during the entire year 1951, and for years prior thereto, and ever since, plaintiff did engage and is engaged in the business of mining the raw material limestone from a quarry at Monolith, Kern County, California, and transporting this material to its Portland cement producing plant adjacent to the quarry for the application of normal and ordinary treatment processes to produce the commodity Portland cement.

V.

That during the entire year 1951, subparagraph (A)(iii) of Section 114(b)(4) of the Internal Revenue Code of 1939, as amended, allowed a depletion tax allowance of 15 per cent of the gross income from a limestone mine to a taxpayer engag-

*Page numbering appearing at foot of page of original Certified Transcript of Record.

ing in such a mining business, provided the deduction shall not in any case exceed 50 per cent of the net income of the taxpayer (computed without allowances for depletion) from the property. That subparagraph (B) of Section 114(b)(4) defined gross income from the property as follows:

“(B) Definition of gross income from property. As used in this paragraph the term ‘gross income from the property’ means the gross income from mining. The term ‘mining’ as used herein shall be considered to include not merely the extraction of the ores or minerals from the ground but also the ordinary treatment processes normally applied by mine owners or operators in order to obtain the commercially marketable mineral product or products and so much of the transportation [3] of ores or minerals * * * from the points of extraction from the ground to the plants or mills in which the ordinary treatment processes are applied thereto * * *”

VI.

That commencing with and during the entire year of 1951 there was a duly issued Regulation by the Commissioner of Internal Revenue, designated Section 39.23(M)-1, purporting, by its subsections (e)(3), to limit the 15 per cent limestone depletion allowable to plaintiff by a so-called “representative market or field price of the first marketable product resulting from any process or processes (applied to the limestone) minus the costs and proportionate profits attributable to the transportation and the

processes beyond the ordinary treatment processes;” or, in the production of Portland cement, that a so-called representative first marketable product from the limestone mined by plaintiff existed when it had been processed by crushing and grinding it with other materials and water to a slurry form and placed in tanks; and, that processing thereafter, by sintering in a rotary kiln, grinding the resultant sinter called clinker to a fineness comparable to flour which product is then called Portland cement, and sacking for shipping or shipping the ground Portland cement in bulk, was not the application of normal and ordinary treatment processes in obtaining the first marketable product by plaintiff.

VII.

That there was not in the entire year 1951 any market for any of the limestone of the character quarried by plaintiff at its quarry and plant at Monolith, California, except for Portland cement produced in bulk or in sacks.

VIII.

That the normal and ordinary process steps applied for the producing of Portland cement are: First, quarrying and primary crushing the rock; second, secondary crushing and grinding the crushed rock with water and silicon, iron and aluminum elements to obtain a properly proportioned limestone slurry; third, sintering the slurry in a rotary kiln; fourth, grinding [4] the resultant limestone clinker with gypsum to a fineness comparable to ordinary

flour into Portland cement; and fifth, sacking for shipping or shipping the Portland cement in bulk.

IX.

That plaintiff, having before, during, and since 1951, maintained its books and reported its taxes upon a calendar year basis, did cause its officers and agents to make its income tax return for the year 1951, and, as compelled by the regulation alleged in paragraph VI hereof, computed its depletion allowance within the limits of this regulation, resulting in an original assessment of an income tax in the sum of \$384,411.65. That thereafter, and in the year 1953, defendants caused a reassessment to be made of plaintiff's income taxes due for the calendar year 1951 in accordance with their interpretation of this regulation resulting in an additional assessment in the sum of \$3,914.91, or a total assessment for the year 1951 in the sum of \$388,326.56. That the entire assessment has been paid by plaintiff to defendants on the dates hereinafter alleged.

X.

That in June, 1954, in the action *Cherokee Brick & Tile Co. v. United States*, 122 F. Supp. 59, the court adjudicated that the regulation alleged in paragraph VI hereof was ineffective to the extent it went beyond the statute alleged in paragraph V hereof. That thereafter, in January, 1955, the Fifth Court of Appeals affirmed said decision; its decision being reported at 218 F. (2d) 424. The Cherokee case involved the mining of clay and by normal and

ordinary processes converting it to brick. In the action *Hitchcock Corporation v. Townsend*, 132 F. Supp. 785 (M.D.N.C., July, 1955) concerning the mining and processing of talc, the court confirmed the Cherokee decision. The Cherokee decision was again confirmed on June 14, 1956, in the proceeding *Virginia Limestone Corporation*, Docket No. 51766, 26 T.C. No. 68 (Prentice Hall 1956, para. 74430). These adjudications are applicable to and binding upon the parties to this litigation. [5]

XI.

That upon learning of the error of the defendants in their construction of the applicable internal revenue statute, plaintiff, on March 9, 1955, caused a claim under oath by its vice-president for refund to be filed with defendants, upon a form provided by the defendants, being form No. 843, to which form plaintiff caused to be attached, a statement, a true copy thereof being Exhibit A attached hereto and made a part of this complaint. That said claim and its attached statement truly set forth the grounds upon which the refund was claimed, including detailed facts apprising the defendants of the amount and basis of the claim.

XII.

That it is apparent from the recitals of the refund claim as filed by plaintiff that plaintiff has been over assessed pursuant to the regulation alleged in paragraph VI, and contrary to the statute as alleged in paragraph V, in the sum of \$166,811.04,

which over-assessment was paid on the dates hereinafter alleged.

XIII.

That the refund claim filed on March 9, 1955, hereinbefore alleged, has neither been allowed nor disallowed by the defendants and more than six (6) months has elapsed from the time of the filing of said claim. That pursuant to Section 3772 (a) (1) (2) of the Internal Revenue Code, 1939, as amended, and Section 6532 (a) of the Internal Revenue Code of 1954, as amended, plaintiff is entitled to commence this action.

XIV.

That except for the additional assessment in 1953 for \$3,914.91, plaintiff paid its taxes for the year 1951 in quarterly installments in the year 1952, as follows:

(1)	March 15, 1952.....	\$126,000.00
(2)	June 15, 1952,.....	126,000.00
(3)	September 15, 1952.....	74,749.91
(4)	December 15, 1952.....	57,661.74

That the additional assessment of \$3,914.91 made in 1953 was paid on [6] February 12, 1954.

XV.

That plaintiff is entitled by statute, Title 26, U.S.C.A., Section 3771(a)(b)(2) (1939 I.R.C.), to interest at the rate of six per cent (6%) per annum upon the over-assessment of \$166,811.04, hereinbefore alleged, from the dates of its payment. That

payment upon said over-assessment first occurred with the installment payment of June 15, 1952, on which date the total amount of the installments paid first exceeded the total amount of tax due for the year of 1951 by the sum of \$30,484.48. That said six per cent (6%) interest is payable on said \$30,484.48 from June 15, 1952, on the full amount of the third installment from September 15, 1952, on the full amount of the fourth installment from December 15, 1952, and on the full amount of the additional assessment from February 12, 1954.

Wherefore, plaintiff prays judgment against the defendants, and each of them, as follows:

1. That plaintiff be awarded judgment against said defendants in the sum of \$166,811.04, plus interest at the rate of six per cent (6%) per annum from the dates of payment of the principal sum.

2. That such appropriate orders and directions as provided by law be made by the Court for the paying and satisfying of the judgment.

3. For such other and further relief as the Court may deem proper.

ENRIGHT & ELLIOTT,
J. HOWARD SULLIVAN,

By /s/ JOSEPH T. ENRIGHT,
Attorneys for Plaintiff. [7]

EXHIBIT A

Monolith Portland Cement Company

A Statement Attached to and Made Part of Claim
for Refund for the Calendar Year Ended 1951

Taxpayer contends, under the theory set forth in *Cherokee Brick and Tile Company v. United States* (U.S.D.C.) Middle District of Georgia (June 4, 1954), 1954 P.H. (Par.) 72954, as affirmed by the Court of Appeals for the Fifth Circuit 1955 P.H. (Par.) 72380, that the first marketable production for the purpose of depletion under Section 114(b) (4)(B) of the Internal Revenue Code of 1939 is finished cement. Therefore, in accordance with the decisions in the aforementioned cases additional depletion is claimed resulting in an overpayment of tax as follows:

Gross sales of finished cement	\$8,698,899.50
Less—Royalty	133,340.02
	<hr/>
	\$8,565,559.48
	<hr/>
Expenses:	
Direct and indirect expenses.....	\$5,131,983.93
Selling expense	2,091,311.96
General and administrative expense	466,391.65
	<hr/>
Total expense	\$7,689,687.54
	<hr/>
Net income from cement operations	\$ 875,871.94
	<hr/> <hr/>
Depletion—limited to 50 per cent of net income	\$ 437,935.97
	<hr/> <hr/>

Net income per R.A.R. dated	
September 17, 1953	\$ 780,744.09
Depletion per R.A.R.	\$ 109,244.28
Depletion as revised	437,935.97 (328,691.69)
<hr/>	
Revised net income	\$ 452,052.40
<hr/>	
Tax per R.A.R. (alternative)	\$ 388,326.56
Tax as revised (alternative)	
Statement Attached	221,515.52
<hr/>	
Overpayment	\$ 166,811.04
<hr/>	

Monolith Portland Cement Company

A Statement Attached to and Made Part of Claim for Refund for the Calendar Year Ended 1951

Alternative Tax:

Revised net income after depletion allowance based on Cherokee Brick and Tile Company case.....	\$452,052.40
Less—Capital gains	8,785.16
<hr/>	
Surtax net income for alternative tax.....	\$443,267.24
<hr/>	
Surtax 50.75% × \$443,267.24 = \$224,958.12	
less \$5,500.00 =	\$219,458.12
Capital gains tax 25% × \$8,785.16.....	2,196.29
<hr/>	
Revised tax	\$221,654.41
Normal tax adjustment for partially tax exempt interest	138.89
<hr/>	
<u>\$221,515.52</u>	

Monolith Portland Cement Company

A Statement Attached to and Made Part of Claim
for Refund for the Calendar Year Ended 1951

The foregoing claim for refund was prepared by the undersigned or under their direction. The facts stated therein were obtained from the taxpayer's records and other sources considered to be reliable and are believed to be true and correct.

/s/ J. W. VAN GORKOM,

Attorney.

ARTHUR ANDERSEN & CO.

Duly verified.

[Endorsed]: Filed July 27, 1956. [10]

[Title of District Court and Cause.]

ANSWER

Comes now the United States and R. A. Riddell, District Director of Internal Revenue, by its and his attorney, Laughlin E. Waters, United States Attorney for the Southern District of California, and answer the allegations of the complaint as follows:

1. Admit the allegations of paragraph I of the complaint.
2. Admit the allegations of paragraph II of the complaint.
3. Admit the allegations of paragraph III of the complaint.

4. Deny the allegations of paragraph IV of the complaint, except admits that during the year 1951, and for years prior thereto, and since, plaintiff did engage and is engaged in the business of mining limestone from a quarry at Monolith, Kern County, California, and transporting this material to its Portland cement manufacturing plant adjacent to the quarry.

5. Deny the allegations of paragraph V of the complaint. [12]

6. Deny the allegations of paragraph VI of the complaint.

7. Deny the allegations of paragraph VII of the complaint.

8. Defendants are without sufficient knowledge or information to admit to the truth of the allegations contained in paragraph VIII of the complaint.

9. Deny the allegations of paragraph IX of the complaint, except admit that plaintiff, having before, during and since 1951, maintained its books and reported its taxes upon a calendar year basis, did cause its officers and agents to make its income tax return for the year 1951, and computed its depletion allowance, resulting in an income tax liability of \$384,794.14; and that thereafter, and in the year 1953, defendants determined a deficiency on plaintiff's income taxes due for the calendar year 1951 and made an additional assessment of \$3,914.91, or a total tax liability for the year 1951 in the sum of \$388,709.05.

10. Deny the allegations of paragraph X of the complaint for the reason that it states conclusions of law.

11. Deny the allegations of paragraph XI of the complaint, except admits that plaintiff on March 9, 1955, caused a claim for refund to be filed with the defendants to which plaintiff caused to be attached a statement, a true copy thereof being Exhibit A attached to the complaint, and that said claim and attached statement set forth the grounds upon which the refund was claimed, except it is not intended to admit any of the allegations contained in said claim for refund or attached statement not expressly admitted elsewhere in this answer.

12. Deny the allegations contained in paragraph XII of the complaint.

13. Admit the allegations contained in paragraph XIII of the complaint.

14. Deny the allegations contained in paragraph XIV of the complaint except admit that plaintiff paid its taxes for the year 1951 in quarterly installments in the year 1952, as follows:

(1) March 17, 1952.....	\$126,000.00
(2) June 13, 1952.....	126,000.00
(3) September 16, 1952.....	75,262.55
(4) December 15, 1952.....	57,531.59

An additional assessment of \$3,914.91, made in 1953, was paid on February 15, 1954.

15. Deny the allegations contained in paragraph XV of the complaint except admits that if plaintiff is entitled to recover in this suit, which defendants expressly deny, plaintiff is entitled to interest at the rate of 6 per cent per annum as provided by law.

Wherefore, defendants demand judgment in its favor with allowable costs.

.....
United States Attorney;

EDWARD R. McHALE,
Assistant U. S. Attorney,
Chief, Tax Division;

JOHN G. MESSER,
Assistant United States
Attorney;

/s/ JOHN G. MESSER,
Attorneys for Defendants.

Affidavit of Service by Mail attached.

[Endorsed]: Filed October 1, 1956. [14]

[Title of District Court and Cause.]

STIPULATION OF FACTS No. 1

It is stipulated and agreed between the parties by their respective attorneys of record that for the purposes of this cause the following facts shall be taken

as true, subject to objection as to relevancy only by either party, and neither party is to be precluded from adducing additional evidence or testimony at the trial:

I.

The above-named United States District Court has jurisdiction of this cause of action.

II.

R. A. Riddell resides within the venue of the Central Division of this [78] Court and is the duly appointed and acting District Director of Internal Revenue, Los Angeles District. During the year 1951, and until January 1, 1953, R. A. Riddell was the Collector of Internal Revenue for the Sixth District (Los Angeles) of California when, under the Reorganization Plan of November 26, 1952, he became the Director of Internal Revenue, Los Angeles District; and, on July 20, 1953, he became and ever since has been, and now is the District Director of Internal Revenue, Los Angeles District.

III.

During all times herein mentioned, the plaintiff, Monolith Portland Cement Company, a Nevada corporation, was and now is a corporation duly qualified to conduct and is conducting business in the State of California, with its principal office in the City of Los Angeles, State of California. That the taxes which were assessed and paid as herein alleged were paid to the District Director of Internal

Revenue, Los Angeles District, Los Angeles, California.

IV.

A. During all of the year 1951 plaintiff mined a calcium carbonate rock generally known as "limestone."

B. For the purposes of this Stipulation of Facts No. 1, the manufacture or production of Portland cement has been divided into the following two divisions. First, those operations listed in Paragraph VIII of this Stipulation of Facts No. 1 are for the preparation and physical proportioning of the raw materials, and, secondly, those listed in Paragraph IX of this Stipulation of Facts No. 1 are for the calcination or heating of the properly proportioned raw materials in a rotary kiln. The calcination or heat treatment causes chemical reactions which result in the formation of new compounds between principal raw materials of limestone, clay and iron cinders. The new compounds are primarily tricalcium silicate, dicalcium silicate, tricalcium aluminate and tetracalcium alumino-ferrite. The mixture of new compounds comes from the kiln in the form of a clinker which is then finely ground with a small amount of gypsum to obtain Portland cement. [79]

V.

The tons of raw materials produced and used (including withdrawals from inventory) by plaintiff and the tons of raw materials purchased and used

(including withdrawals from inventory) by plaintiff in the year 1951 are as follows:¹

	Produced	Used
Limestone	769,946 tons	771,254
Clay #1	93,425 tons	95,102
Clay #2	21,270 tons	21,659
Tufa	9,237 tons	9,223
Gypsum	22,310 tons	23,393
<hr/>		
Total	916,188	920,631
	Purchased	Used
Iron Cinders	11,916 tons	7,563
Fluorspar	90 tons	98
<hr/>		
Total	12,006	7,661
<hr/>		
Total Raw Materials..	928,194	928,292

VI.

The actual computed average chemical analyses of the raw materials produced by plaintiff during the year 1951, all mined within 50 miles of its cement plant except gypsum which is more than 50 miles (approximately 120 miles), are as follows:

Analysis ²	Limestone	Clay #1	Clay #2	Gypsum
SiO ₂	9.29	55.90	74.60	
Al ₂ O ₃	2.59	14.96	10.19	
Fe ₂ O ₃	0.75	6.94	4.74	
CaO	48.26	8.39	3.36	
MgO	0.68	4.35	0.78	
Loss	38.00	7.27	5.14	
ALK.asNa ₂ O	0.19	2.07	0.99	
CaCO ₃	85.20 ³			
Acid Insoluble				7.40
SO ₃				(41.60)
Gypsum				84.90

¹Each raw material listed is identified by the name used by plaintiff in keeping its raw materials production records, except that "Clay No. 2" is identified as "silica" in said raw materials productions records. [80]

(2) SiO_2 =1 atom of silicon and 2 atoms of oxygen which is silica or silicon oxide.

Al_2O_3 =2 atoms of aluminum and 3 atoms of oxygen which is alumina.

Fe_2O_3 =2 atoms of iron and 3 atoms of oxygen which is iron oxide.

CaO =1 atom of calcium and 1 atom of oxygen which is calcium oxide.

MgO =1 atom of magnesium and 1 atom of oxygen which is magnesium oxide.

Loss=weight lost as the raw material is heated (primarily carbon dioxide).

ALK. as Na_2O ; Alk=Alkali; Na_2O =2 atoms of sodium and 1 atom of oxygen which is sodium oxide called alkali.

CaCO_3 =1 atom of calcium, 1 atom of carbon and 3 atoms of oxygen which is calcium carbonate.

SO_3 =1 atom of sulphur and 3 atoms of oxygen which is sulphur trioxide.

(3) This percentage primarily equals the CaO of 48.26 and the loss of 38.00, the difference due to instrument variations. [81]

VII.

The actual computed average high and low, approximately weekly, chemical analyses of the raw materials produced by plaintiff during the year 1951, are as follows:

analysis ⁴	Limestone		Clay #1		Clay #2		Gypsum	
	High	Low	High	Low	High	Low	High	Low
O ₂	10.89	8.11	57.03	55.05	79.07	69.69		
SiO ₂	3.09	2.25	15.46	14.08	12.48	8.11		
Fe ₂ O ₃	0.95	0.62	7.37	6.51	5.54	3.86		
CaO	49.23	47.05	9.04	7.81	4.49	2.23		
MgO	0.84	0.46	4.66	4.00	1.07	0.49		
Gross	38.74	37.13	8.11	6.38	6.55	4.08		
Loss as Na ₂ O	0.25	0.14	2.40	1.74	1.41	0.83		
CaCO ₃	87.68 ⁵	82.45 ⁵						
Acid Insoluble							8.90	5.70
SiO ₂							(42.28)	(40.00)
Gypsum							88.10	82.90

VIII.

The parties to this action agree that the extraction and processing operations set forth below for the mining of the calcium carbonate rock generally known as "limestone" are includable in determining gross income from mining under Section 114 (b) of the Internal Revenue Code of 1939, as amended, and were employed by plaintiff at its quarry and cement plant at Monolith, California, during the year 1951 in order to obtain various types of Portland cement.

A. Drilling and primary blasting from the face of the quarry by the open pit method to obtain the limestone rock.

B. Secondary or squib blasting to further break the limestone rock into manageable size.

(4) See footnote (2) *supra*, on page 4.

(5) See footnote (3) *supra*, on page 4. [82]

C. Loading by shovels into dump trucks which carry the limestone rock to an inclined chute where it is deposited into dump rail cars for transportation to the primary crusher.

D. The dump rail cars deposit the limestone rock into a large primary crusher, which reduces the size of the extracted rock to pieces with a maximum dimension of about six inches.

E. After primary crushing, the crushed limestone falls onto a conveyor which takes it to a secondary crusher for further reduction in size.

F. After secondary crushing, the oversize limestone pieces are screen-separated from the remainder and returned for further crushing; the remainder is ball-milled for size reduction and then conveyed to bunkers for transfer to rail cars for transportation to the cement plant less than two miles away.

G. The dump rail cars deposit the limestone on a conveyor belt which takes it to either a raw storage pile or to a limestone hopper. The raw storage pile is used to replenish the limestone hopper supply.

H. The limestone from its hopper is then blended with clay #1 from another hopper, with clay #2 from another hopper and with iron cinders from another hopper by measuring and conveying equipment.

I. The above blended materials are then gravity-fed into another ball mill in which water is added simultaneously in an amount equal to approximately

36% of the weight of the dry raw materials, where it is ground to a proper fineness known as a "slurry."

J. The slurry from the ball mill is conveyed to tube mills for further grinding.

K. The slurry is next conveyed to a wet slurry tank where it is kept in suspension and blended by a revolving paddle mechanism, and after blending it is fed into a kiln.

IX.

The parties are in disagreement as to further operations being includable in the computation of plaintiff's gross income from mining. Defendant contends the "ordinary treatment processes" normally applied by mine owners [83] and operators to limestone have ceased under the percentage depletion provisions of Section 114 (b) of the Internal Revenue Code of 1939, as amended. Plaintiff contends that the following are also "ordinary treatment processes" normally applied by mine owners and operators in order to obtain any of the various types of Portland cement from limestone, and that they are properly includable in the computation of plaintiff's gross income from mining.

A. The kiln feed slurry is run into the upper end of rotary kilns, which are in the form of long rotating cylinders set at a slight inclination. The feed travels gradually toward the lower end. Hot gases from a flame at the lower end evaporate the water from the slurry, and the application of heat

at a proper temperature chemically combines the remaining material to a dense "clinker."

B. The clinker is conveyed to a grinding mill where gypsum is added, and these are ground to a great fineness to become one of the various types of Portland cement.

C. The cement is placed in silos from which it is loaded and shipped in bags or in bulk.

X.

The parties agree that the processes listed in both Paragraph VIII and Paragraph IX of this Stipulation of Facts No. 1 are the usual and customary process steps applied in the cement industry to obtain any of the various types of Portland cement.

XI.

The plaintiff, during the tax year 1951, maintained its books on the accrual basis and reported its taxes upon a calendar year basis. The plaintiff timely filed its income tax return for the year 1951, and, based upon the Regulations of the Commissioner of Internal Revenue, computed its depletion deduction, resulting in a reported income tax liability, as shown on said return, in the sum of \$384,411.65, plus an interest liability in the sum of \$382.49. Thereafter, in the year 1953, defendant caused the said return to be audited, and assessed a deficiency in tax against plaintiff in the sum of \$3,914.91, plus interest in the sum of \$367.79. The above [84] taxes, deficiency and interest were paid by plaintiff on the following dates and in the following amounts:

March 17, 1952	\$126,000.00
June 13, 1952	126,000.00
September 16, 1952	75,262.55
December 15, 1952	57,531.59
February 15, 1954	4,282.70

XII.

Plaintiff on March 9, 1955, duly filed a claim for refund with defendant setting forth the grounds upon which the refund was claimed and upon which this suit is brought.

XIII.

The defendant neither allowed nor disallowed plaintiff's claim for refund and more than six (6) months elapsed from the time of filing said claim for refund to the time of filing this suit.

XIV.

No part of the sum claimed by plaintiff has been credited, remitted, refunded or repaid to the plaintiff or to anyone on its account. Based upon the decision of this Court the taxes in question shall be recomputed and judgment entered thereon with interest as provided by law.

XV.

The parties agree (a) that plaintiff's gross income from the sale of the various types of Portland cement, including its containers, during the tax year 1951 was \$8,565,559.48; and (b) that plaintiff's net income for the purpose of computing percentage depletion during the tax year 1951 was \$875,871.94.

XVI.

It requires approximately one (1) ton of limestone to produce three (3) barrels of Portland cement from plaintiff's raw materials.

XVII.

The parties agree that the only product sold by plaintiff during the tax year 1951 as a result of its limestone mining operations was Portland [85] cement.

XVIII.

Subject only to an objection as to relevancy as set forth in the preamble of this Stipulation of Facts No. 1 the following documents or photostatic copies thereof may be submitted to the court at the pretrial, the hearing of any motion or at the trial of this action.

A. Exhibit No. 1: Plaintiff's 1951 United States Corporation Income Tax return, dated September 15, 1952, including all exhibits and documents attached thereto.

B. Exhibit No. 2: Revenue Agents' Report dated September 17, 1953, and R. A. Riddell's Form 892 letter dated November 12, 1953, to which it is attached, and including all exhibits and documents attached to said report.

C. Exhibit No. 3: Form 870-Waiver of Restrictions received by the Internal Revenue Service, Los Angeles District, on September 9, 1953.

D. Exhibit No. 4: Subject to an objection as to its relevancy or materiality only, the Revenue Agents' Report dated June 1, 1956, and R. A. Riddell's Form 1203 letter dated July 27, 1956, to which it is attached, and including all exhibits and documents attached to said report.

Executed This 3rd day of December, 1956.

/s/ JOHN G. MESSER.

ENRIGHT & ELLIOTT,

By /s/ JOSEPH T. ENRIGHT.

[Identified as Plaintiff's Exhibit No. 1.]

[Endorsed]: Filed December 3, 1956. [86]

[Title of District Court and Cause.]

STIPULATION OF FACTS No. 2

It is stipulated and agreed between the parties by their respective attorneys of record that for the purposes of this cause the following facts shall be taken as true, subject to objection as to relevancy only by either party, and neither party is to be precluded from adducing additional evidence or testimony at the trial:

1.

The name limestone is applied generally to any rocks which consist essentially of calcium carbonate

or calcium magnesium carbonate or mixtures of these two compounds.

2.

A graphical presentation of limestones would divide them as follows: [189]

Limestones

Limestone—high in calcium carbonate (CaCO_3) and low in magnesium carbonate (MgCO_3);

Magnesium (magnesian) limestone—amounts of calcium carbonate (CaCO_3) and magnesium carbonate (MgCO_3) intermediate between limestone and dolomite;

Dolomite—high in magnesium carbonate (MgCO_3) with a possible maximum content of 46 per cent.

3.

Pure limestone consists of carbonate of lime (CaCO_3) but such material is rarely found except in the form of crystalline calcite, which has a specific gravity of about 2.7 and hardness about 3.

4.

Commercially exploited deposits of limestone (generally) contain variable amounts of iron oxide, alumina, magnesia, silica, phosphorus and sulphur. The content of lime (CaO) may vary between 22 and 56 per cent, magnesia (MgO) from 0 to 21 per cent, alumina (Al_2O_3) is usually fairly low but some limestones may carry over 5 per cent. Iron oxides

rarely exceed 3 or 4 per cent. Silica may be present either in the form of quartz or as a constituent of clay.

5.

Limestone deposits occur widely in the United States and because of its important physical and chemical characteristics it is used more extensively than any other form of rock.

6.

The United States Bureau of Mines, Minerals Yearbook, 1952 and 1953, chapter on "Stone," Table 34, Exhibits A and B of this stipulation, report "Limestone sold or used for all purposes [190] in the United States," as follows:

	1950	In Short Tons		1953
		1951	1952	
limestone	180,919,000	205,480,000	217,255,000	224,714,000
land and				
natural cement	59,361,000	64,284,000	64,305,000	66,251,000
e	14,980,000	16,511,000	16,146,000	19,348,000
	<hr/>	<hr/>	<hr/>	<hr/>
total	255,260,000	286,275,000	297,706,000	310,313,000

7.

The United States Bureau of Mines, Minerals Yearbook, 1951, chapter on "Stone," (including limestone), Table 5, Exhibit C of this stipulation, reports "Dimension stone sold or used by producers in the United States in 1951" and Table 30 of Exhibit A reports "Limestone (crushed and broken stone) sold or used by producers in the United States in 1951," as follows:

Use	1951		1952	
	Short tons	Value	Short tons	Value
Other uses ⁴	1,395,343	2,201,926	995,452	1,562,9
Use unspecified	806,509	1,034,891	1,140,872	1,568,5
Total	20,438,880	\$38,702,831	19,328,515	\$38,884,8

10.

The United States Bureau of Mines, Minerals Yearbook, 1952, chapter on "Stone," Table 33 of Exhibit A reports "Sales of fluxing limestone 1943-47 (average) and 1948-52, by uses" as follows:

Year	Blast furnaces		Open-hearth plants		Total
	Short tons	Value	Short tons	Value	
1943-47 (average)	23,239,006	\$18,531,329	5,611,730	\$4,928,601	
1948	26,339,790	24,721,052	7,873,410	8,695,137	
1949	23,768,970	24,127,897	5,922,020	6,929,134	
1950	28,397,710	29,222,700	6,936,900	7,948,041	
1951	32,007,284	35,941,217	6,784,102	8,279,021	
1952	28,158,299	32,857,562	5,629,204	6,879,035	

Year	Other smelters ¹		Other metallurgical ²		Total	
	Short tons	Value	Short tons	Value	Short tons	Value
1943-47 (av.)	538,796	\$ 540,831	214,174	\$237,610	29,603,706	\$24,238,1
1948	503,490	609,354	185,250	224,465	34,901,940	34,250,1
1949	728,960	835,962	332,370	374,649	30,752,320	32,267,2
1950	457,630	587,643	177,580	174,004	35,969,820	37,932,8
1951	842,877	992,651	295,694	409,236	39,929,957	45,622,2
1952	926,063	1,142,894	195,249	239,860	34,908,815	41,119,5

¹Includes flux for copper, gold, lead, zinc, and unspecified smelters.

²Includes flux for foundries and for cupola and electric furnaces.

⁴Includes stone for acid neutralization, athletic-field marking, carbon dioxide, chemicals (unspecified), concrete blocks and pipes, dyes, fill material, light bulbs, motion-picture snow, oil-well drilling, patching plaster, rayons, roofing granules, spalls, and water treatment.

11.

The United States Bureau of Mines, Minerals Yearbook, 151 chapter upon cement reported 249.5 million barrels (376 pounds) were produced in the United States in 1951. The average net mill realization was \$2.54 per barrel of 376 pounds. (p. 242.) There were 155 producing plants. (p. 244.) “* * * output in California was again considerably higher reaching nearly 30 million barrels in 1951.” Table 2, p. 246, reports 29,918,293 barrels were produced in California in 1951. The Bureau classified the nationwide use of raw materials in the production of Portland cement and the percentages used as follows:

- (a) “Limestone and clay or shale” 69% (2)
- (b) “Cement rock and pure limestone” 20%
- (c) “Blast furnace slag and limestone” 10%
- (d) “Marl and clay” 1%

((2) includes 7 plants using oystershells and clay.)

12.

The Cal. Division of Mines, Journal of Mines and Geology, Vol. 43, No. 3, July, 1947, reports p. 188:

“Portland cement consumes more limestone than all other uses in California. All of it so used is ‘captive’ tonnage, and no state statistics have been published giving the tonnage or value. However, the record of cement production may be used to arrive at an approximate annual figure for limestone used for cement. In 1943 the total Portland cement production in California was 18,515,085

barrels of 376 pounds each or 3,480,279 short tons. If it is assumed that the average lime content of all Portland cement made in the state is 65 per cent, and that all limestone so used will average 90 per cent CaCO_3 , the [196] total consumption of limestone for this purpose was about 4,488,000 short tons. Of course there are several varieties of cement made in which the analysis may vary from that of general-use, moderate heat cement, but it is believed this estimate is not more than 10 per cent in error."

13.

The Cal. Division of Mines, Mineral Information Service, Vol. 8, No. 2, of February 1, 1955, is the only presently located report on cement by that agency. It reports 8,932,829 short tons of lime materials used for manufacturing 32,239,000 barrels of cement in the year 1953. (pp. 4-5.)

14.

For some of the important chemical uses the following specifications for limestone are generally recognized:

(a) U. S. Bureau of Standards, Circular No. 207 (1925), on the recommended specifications for limestone, lime powder and hydrated lime for use in the manufacture of sugar:

	Sugar-soluble lime, (min.) Percent	MgO (max.) Percent	Loss on ignition (max.) Percent
Limestone for the Steffen process.....	90	3	....
Limestone for other processes.....	85	3	....
Quicklime for the Steffen process....	90	3	2
Quicklime for other processes.....	85	3	5
Lime powder	90	3	2
Hydrated limes	86	3	....

Silica is objectionable in limestone for making lime for use in sugar manufacture as it may become colloidal in the juices, forms films on the crystals, and retard their growth.

(b) U. S. Bureau of Standards Circular No. 118 (1921), for the recommended specifications for limestone and lime in the manufacture of glass: [197]

	Class 1		Class 2		Class 3	
	Max.	Min.	Max.	Min.	Max.	Min.
	Percent		Percent		Percent	
Lime and magnesia,						
CaO plus MgO .....	....	94	....	91	....	83
Iron oxide, Fe ₂ O ₃	0.2	....	1.0	....	1.0	....
Alumina, Al ₂ O ₃	3.0	....	5.0	....	5.0	....
Sulphur plus phosphorus,						
SO ₃ plus P ₂ O ₃	1.0	....	1.0	....	1.0	....
Silica, SiO ₂	4.0	....	9.0	....	17.0	....

(c) U. S. Bureau of Mines Information Circular No. 7402 (1947), for the recommended specifications for limestone in the manufacture of calcium carbide (acetylene gas):

Limestone Content	Per Cent
Limestone—Very pure, high-calcium	
Phosphorus, P	(max.) 0.01
Magnesia, MgO	(max.) 0.5
Combined Alumina and Iron oxide, Al ₂ O ₃ plus Fe ₂ O ₃	(max.) 0.5
Silica, SiO ₂	(max.) 1.2
Sulphur, S	(max.) a trace

(d) A State Geological Survey of Illinois Title "A Summary of the Uses of Limestone and Dolomite" (1938), summarizes the recommended specifications for limestone for the following uses:

(1) Alkalies

Limestone Content	Per Cent
Calcium carbonate, CaCO_3	90-99
Combined Iron oxide, Alumina and Silica, Fe_2O_3 plus Al_2O_3 plus SiO_2	0- 3
Magnesium carbonate, MgCO_3	0- 6

Alternative specifications of some manufacturers are suggested as follows:

Limestone Content	Per Cent
Calcium carbonate, CaCO_3	(min.) 93
Magnesium carbonate, MgCO_3	3- 5
Silica, SiO_2	3

(Most U. S. manufacturers do not want Silica in excess of 1%.)

(2) Aluminum Oxide

Limestone Content	Per Cent
Calcium carbonate, CaCO_3	(min.) 97
Silica, SiO_2	(max.) 1

(3) Ammonia

No specifications for limestone.

(4) Baking powders

High calcium limestone recommended.

(5) Calcium nitrate

High calcium limestone recommended.

(6) Explosives

Rather pure calcium carbonate limestone to marble dust containing as much magnesium as calcium. Impurities in limestone are of no practical importance.

(7) Fertilizers

High calcium carbonate probably desirable. For use as Filler, in fertilizer manufacture, a reasonably pure limestone is recommended. [199]

(8) Blast-furance flux (Bessemer)

Limestone Content	Per Cent
Calcium carbonate, CaCO_3	(min.) 90-95
Combined Silica and Alumina	
SiO_2 plus Al_2O_3	(min.) 3- 5
Alumina, Al_2O_3	(max.) 2
Combined Sulphur and phosphorus, S plus P	(max.) 0.1
Phosphorus for "Bessemer Iron".	(max.) 0.01

(9) Open-Hearth Steel Flux

Limestone Content	Per Cent
Magnesium carbonate, MgCO_3 ..	10 (MgO-5%)
Alumina, Al_2O_3	(max.) 1.5
Silica	1
Combined Phosphorus and Sulphur, P plus S	low

(10) Non-Ferrous Metal Flux

High calcium limestone commonly used as flux in smelting copper, nickel, lead, zinc, gold, silver, antimony and other metals.

(11) Mineral feed stock

	Per Cent
Limestone Content	
Calcium carbonate, CaCO_3	(min.) 95
Flourine	none

(12) Paper (Tower System)

	Per Cent
Limestone Content	
Calcium carbonate, CaCO_3	(min.) 95
Magnesium carbonate, MgCO_3	(max.) 2.5
Combined impurities	(max.) 2.5
Mica, graphite flakes, carbonaceous material and pyrite	undesirable

(Sulphite System)

Limestone Content (Lime Equivalent)	
	Per Cent
Calcium oxide, CaO	(min.) 53
Magnesium oxide, MgO	(max.) 1.5
Oxides of silicon, iron and aluminum	(max.) 1.5
Organic matter	(max.) 0.5

(13) Phenol

High calcium limestone recommended with magnesia, iron oxide and alkali as low as possible.

(14) Poultry grit

High calcium limestone recommended with fluorine not in excess of 0.1 per cent.

15.

The California State Division of Mines Bulletin No. 176, dated October, 1956, reports in a table "Specifications for Limestone and Dolomite and Lime for the Principal Consuming Industries," being Exhibit D of this stipulation.

16.

The United States Bureau of Mines Information Circular No. 7402, dated May, 1947, summarizes the physical and chemical specifications for the various industrial uses of limestones and dolomite, except for cement manufacturing, an important well-known use, being Exhibit E of this stipulation.

17.

The United States Bureau of Mines Information Circular No. 7738, dated March, 1956, summarizes the Limestone and Dolomite industry operations, uses, distribution of deposits, and area marketing conditions, being Exhibit F of this stipulation.

18.

The California State Division of Mines Bulletin No. 176, dated October, 1956, reports upon Limestones, Dolomite and Lime [201] Products, being Exhibit G of this stipulation.

19.

Defendant is to furnish to plaintiff the circulars, identified in subparagraphs (a), (b), (c) and (d) of paragraph 14 of this stipulation, and plaintiff

reserves the right to verify the accuracy of these specifications.

Dated: February 13, 1957.

LAUGHLIN E. WATERS,
United States Attorney;

EDWARD R. McHALE,
Assistant United States At-
torney, Chief, Tax Division;

JOHN G. MESSER,
Assistant United States At-
torney,

/s/ JOHN G. MESSER,
Attorneys for Defendants, United States of Amer-
ica, and Robert A. Riddell.

ENRIGHT & ELLIOTT,
J. HOWARD SULLIVAN,

/s/ JOSEPH T. ENRIGHT,
Attorneys for Plaintiff, Monolith Portland Cement
Company.

[Identified as Plaintiff's Exhibit No. 8.]

[Endorsed]: Filed February 15, 1957. [202]

[Title of District Court and Cause.]

STIPULATION OF FACTS No. 3

It Is Stipulated and Agreed between the parties by their respective attorneys of record that for the

purposes of this cause the following facts shall be taken as true, subject to objection as to relevancy only by either party, and neither party is to be precluded from adducing additional evidence or testimony at the trial or before submission of this cause to the Court:

I.

During the year 1951, a total of 94,966 short tons of "clinker" (as defined in Paragraph IX, subparagraphs A and B, of Stipulation of Facts No. 1 heretofore entered into by the parties) were sold by two cement manufacturing companies to a company which sells various building materials in the Los Angeles [382] area. Said company added gypsum to the purchased "clinker" and ground it to the required fineness to become one of the various types of Portland cement which it sold.

Plaintiff was not one of the cement companies which sold said "clinker."

II.

There were approximately 364 pounds to a barrel of "clinker" which was sold in 1951 for \$1.8773 per barrel, resulting in a price of \$10.31 per short ton of "clinker." The dollar value of said "clinker" sold in the year 1951 was, therefore, \$979,099.46 (94.966 x \$10.31).

III.

The two cement companies, which sold the "clinker" above set forth, owned stock in the company which purchased and ground said "clinker" into cement. Also, the presidents of the cement com-

panies which sold the "clinker" are directors of the company which purchased the "clinker."

Dated: July 11, 1957.

ENRIGHT & ELLIOTT,

By /s/ JOSEPH T. ENRIGHT,
Attorneys for Plaintiff, Monolith Portland Cement
Company.

LAUGHLIN E. WATERS,
United States Attorney;

EDWARD R. McHALE,
Assistant United States At-
torney, Chief, Tax Division;

JOHN G. MESSER,
Assistant United States At-
torney,

/s/ JOHN G. MESSER,
Attorneys for Defendants, United States of Amer-
ica and Robert A. Riddell.

[Identified as Plaintiff's Exhibit No. 19.]

[Endorsed]: Filed July 11, 1957. [383]

[Title of District Court and Cause.]

MINUTES OF THE COURT
AUGUST 2, 1957

Present: Hon. Wm. C. Mathes, District Judge.
Counsel for Plaintiff: Joseph T. Enright.
Counsel for Defendant: John G. Messer,
Asst. U. S. Attorney.

Proceedings: Trial.

Plaintiff's Exhibits 1 through 23 are received in evidence.

Plaintiff rests.

Government rests.

Court Orders cause continued to October 28, 1957, 1:30 p.m. for oral argument.

JOHN A. CHILDRESS,
Clerk;

By /s/ P. D. HOOSER,
Deputy Clerk. [385]

[Title of District Court and Cause.]

SUPPLEMENT TO COMPLAINT
FOR REFUND OF TAXES PAID

Plaintiff further complains of defendants and each of them, and alleges:

I.

That since the parties hereto rested their respective cases, a dispute has arisen between them as to the proper method of accounting to be used in computing the tax refund due the plaintiff.

II.

That the dispute relates to the accounting for the exclusion, for percentage depletion purposes, of the process or operation followed by plaintiff in packing and loading a portion of its finished cement in bags or sacks. [392]

III.

That on December 20, 1957, plaintiff offered in writing to make settlement of the dispute as follows:

“Monolith is willing to negotiate the settlement of the pending case * * * with the understanding that in such settlement the principal amount of the refunds * * * will be computed in a manner wherein the costs, etc., attributable to iron cinders, fluorspar and bags and bagging are excluded.”

That on January 2, 1958, as an inducement to plaintiff's agreeing to a further continuance of the case, defendants, by Charles K. Rice, Assistant Attorney General, Tax Division, accepted plaintiff's proposal as follows:

“* * * we have been advised that the District Director of Internal Revenue at Los Angeles has been requested to recompute the amount of tax and assessed interest (if any) refundable to the taxpayer as the result of computing the taxpayer's gross income subject to depletion on the basis of its sales price of bulk cement as applied to its total production, excluding cost of iron cinders, fluorspar, bags and the cost attributable to bagging.”

That on January 9, 1958, plaintiff replied to defendants as follows:

“* * * This basis is satisfactory to Monolith. In addition, we will continue our joint effort to

conclude both the Monolith and the Monolith Portland Midwest Company tax refund matters for the years 1951 to and including, 1954 * * *”

IV.

That under the terms of the agreement of the parties: (a) plaintiff’s gross income from mining for 1951 is \$8,107,655.70; [393] (b) plaintiff’s costs and expenses attributable to mining is \$6,861,489.51; and (c) plaintiff’s net income from mining is \$1,246,166.19. That 15% of the gross income from mining is \$1,216,148.36, and 50% of the net income from mining is \$623,083.10.

V.

That these figures comply with the accounting procedures herein set out, and result in plaintiff’s being entitled to a tax refund for the year 1951 in the amount of \$260,773.20 plus the amounts of assessed interest, with interest at 6% per annum.

Wherefore, plaintiff prays that it be awarded judgment against the defendants in the sum of \$260,773.20, plus the amounts of interest assessed against plaintiff on account of its income taxes for the year 1951, plus interest at the rate of 6% per annum from the dates of payment.

ENRIGHT & ELLIOTT,

By

Affidavit of service by mail attached.

[Endorsed]: Filed January 31, 1958. [394]

[Title of District Court and Cause.]

MINUTES OF THE COURT
MARCH 21, 1958

Present: Hon. Wm. C. Mathes, District Judge.
Counsel for Plaintiff: Jos. T. Enright,
Bill B. Betz, Norman Elliott.
Counsel for Defendant: John G. Messer,
Assistant U. S. Attorney; Gerard
O'Brien, Assistant Attorney General.

Proceedings: For trial. Court convenes at 9:30 a.m.
Court orders trial proceed.

Attorney Enright makes opening statement.

Attorney O'Brien makes opening statement.

Plf's Exs. 24, 25, and 26 are marked for ident.
and received into evidence. (Exhibit 26 is received
as excluded evidence.) (Pursuant to Rule 43(c).)

Plf's Exs. 27 and 28 are marked for ident. and
received into evidence.

William E. Neuhauser is called, sworn, and testi-
fies for plaintiff.

Plf's Ex. 29 is marked for ident. and received
into evidence (as to year 1951 only).

Plf's Ex. 30 is marked for ident. and received into
evidence.

At 11:52 a.m. court recesses. At 1:55 p.m. court
reconvenes herein. All present as before. Court or-
ders trial proceed.

William E. Neuhauser resumes testimony.

Waldo A. Gillette is called, sworn, and testifies
for plaintiff.

Plf's Exs. 31 and 32 are marked for ident. and received into evidence.

Kenneth H. Pilkenton is called, sworn, and testifies for plaintiff as adverse witness.

At 3:05 p.m. court recesses. At 3:10 p.m. court reconvenes herein. All present as before. Court orders trial proceed.

Plaintiff rests.

It Is Ordered that cause is continued for oral argument and further trial to March 24, 1958, 10 a.m.

JOHN A. CHILDRESS,
Clerk;

By /s/ CHARLES E. JONES,
Deputy Clerk. [425]

[Title of District Court and Cause.]

AMENDMENT TO COMPLAINTS
TO CONFORM TO PROOF

Comes now the plaintiff and amends its complaint to conform to the proof.

I.

Omit paragraphs IX and XIV and substitute as paragraph IX the following, to allege:

The plaintiff, during the tax year 1951, maintained its books on the accrual basis and reported its taxes upon a calendar year basis. The plaintiff timely filed its income tax return for the year 1951, and, based upon the Regulations of the Commis-

sioner of Internal Revenue, computed its depletion deduction, resulting in a reported income tax liability, as shown on said return, in the sum of \$384,411.65, plus an interest liability in the sum of \$382.49. Thereafter, in the [426] year 1953, defendant caused the said return to be audited, and assessed a deficiency in tax against plaintiff in the sum of \$3,914.97 plus interest in the sum of \$367.79. The above taxes, deficiency and interest were paid by plaintiff on the following dates and in the following amounts:

March 17, 1952.....	\$126,000.00
June 13, 1952.....	\$126,000.00
September 16, 1952.....	\$ 75,262.55
December 15, 1952.....	\$ 57,531.59
February 15, 1954.....	\$ 4,282.70

II.

Omit paragraphs XII and XV and substitute as paragraph XII the following, to allege:

The amount of tax required to be paid by plaintiff was the sum of \$124,641.43, which amount when deducted from the payments alleged in paragraph I hereof results in an overpayment in the amount of \$264,435.41 or a refund due to plaintiff in that amount plus interest at the rate of 6% per annum from the date of each of the payments to the extent each payment resulted in an overpayment. No part of the overpayment by plaintiff has been credited, remitted, refunded or repaid to plaintiff.

Wherefore, plaintiff prays that it be awarded judgment against defendants in the sum of \$264,-435.41 plus interest at the rate of 6% per annum from the dates of each overpayment.

ENRIGHT & ELLIOTT,
J. HOWARD SULLIVAN,

By /s/ JOSEPH T. ENRIGHT,
Attorneys for Plaintiff.

[Endorsed]: Filed March 24, 1958. [427]

[Title of District Court and Cause.]

ANSWER TO SUPPLEMENT
TO COMPLAINT

Come Now the United States and R. A. Riddell, District Director of Internal Revenue, by its and his attorneys, Laughlin E. Waters, United States Attorney for the Southern District of California, and answer the allegations of the complaint as follows:

1. Deny the allegations of paragraph I of the supplement to complaint. Defendants allege that since the proceedings in this case were closed taxpayer by this supplement to complaint is amending paragraphs VI, VII and VIII of its complaint and is now proceeding upon the legal theory that the income which is attributable to bags, bagging and loading of the bags filled with cement are non-mining processes under Sections 23(m) and 114(b)

(4) of the Internal Revenue Code of 1939 and beyond the stage at which plaintiff first sells its mineral product in commerce (that is, cement sold in bulk form, f.o.b., plant). Defendants do not admit to the validity of [428] this legal theory but do admit that there is a dispute between the parties as to the proper method of accounting to be used in computing the tax refund due the plaintiff should the plaintiff's present legal theory be sustained.

2. Deny the allegations contained in paragraph II of the supplement to complaint. Defendants reaffirm herein the matters alleged in answer to paragraph I of the supplement to complaint.

3. Deny. Defendants allege that on December 4, 1957, plaintiff sent a telegram to Assistant Attorney General Charles K. Rice containing an offer to negotiate settlement of the pending case. Defendants did not accept plaintiff's proposal for settlement and plaintiff expressly withdrew its offer to settle the pending case by telegram dated March 16, 1957, and addressed to the Tax Division of the Justice Department which stated:

“This will be our position tomorrow and we are asking that Monolith's and your accountants be heard forthwith and that the case be argued and submitted.”

4. Deny.

5. Deny.

Wherefore, defendants demand that plaintiff's complaint and its supplement to complaint be dis-

missed with prejudice, and that costs be allowed to the defendants.

LAUGHLIN E. WATERS,
United States Attorney;

EDWARD R. McHALE,
Assistant United States Attorney, Chief, Tax Division;

JOHN G. MESSER,
Assistant U. S. Attorney;

/s/ JOHN G. MESSER,
Attorneys for Defendants, United States of America, and R. A. Riddell.

Receipt of copy acknowledged.

[Endorsed]: Filed March 24, 1958. [429]

[Title of District Court and Cause.]

MINUTES OF THE COURT
MARCH 24, 1958

Present: Hon. Wm. C. Mathes, District Judge.

Counsel for Plaintiff: Jos. T. Enright
and Bill B. Betz.

Counsel for Defendant: Gerard O'Brien
and John G. Messer.

Proceedings: For further trial (oral argument).

Attorney for plaintiff argues.

Plf's Ex. 33 is marked for ident. and received in evidence.

Lodged plaintiff's proposed Ultimate Findings Memo.

Attorney for defendant argues.

Attorney for plaintiff argues in rebuttal.

Court rules that the case is dismissed without prejudice as against the Director of Internal Revenue, R. A. Riddell.

Attorney for plaintiff to prepare findings and judgment within ten days.

JOHN A. CHILDRESS,
Clerk;

By /s/ CHARLES E. JONES,
Deputy Clerk. [430]

[Title of District Court and Cause.]

NOTICE OF ENTRY

Re: *Monolith Portland Cement Co. vs. U. S. A., et al.*, No. 20256—WM.

You are hereby notified that Order for election as between defendants and dismissal defendant Robert A. Riddell, etc., and judgment in the above-entitled case has been entered this day in the docket.

Dated: April 14, 1958.

CLERK, U. S. DISTRICT
COURT,

By C. A. SIMMONS,
Deputy Clerk. [460]

[Title of District Court and Cause.]

ANSWER TO AMENDED COMPLAINT

Come Now the United States and R. A. Riddell, District Director of Internal Revenue, by its and his attorney, Laughlin E. Waters, United States Attorney for the Southern District of California, and answer the allegations of the amended complaint as follows:

1. Admits the allegations contained in Paragraph I of the amended complaint.

2. Denies the allegations contained in Paragraph II of the amended complaint, except to admit that the amount of tax required to be paid by plaintiff was the sum of \$124,641.43 and that no part of the sum of \$264,435.41 has been credited, remitted, refunded, or repaid to plaintiff.

Wherefore, defendant prays that plaintiff's complaint as amended be dismissed with prejudice and defendants be allowed their court costs. [441]

LAUGHLIN E. WATERS,
United States Attorney;

EDWARD R. McHALE,
Assistant United States Attorney, Chief, Tax Division;

JOHN G. MESSER,
Assistant U. S. Attorney.

/s/ JOHN G. MESSER,
Attorneys for Defendant,
United States of America.

Affidavit of service by mail attached.

[Endorsed]: Filed April 7, 1958. [442]

[Title of District Court and Cause.]

DEFENDANT'S PROPOSED AMENDMENTS
TO PROPOSED FINDINGS OF FACT
AND CONCLUSIONS OF LAW LODGED
BY DEFENDANT ON APRIL 4, 1958

Findings of Fact

I.

The tons of raw materials produced and used (including withdrawals from inventory) by plaintiff and the tons of raw materials purchased and used (including withdrawals from inventory) by plaintiff in the year 1951 are as follows:

	Tons Produced	Tons Used
Limestone	769,946	771,254
Clay #1	93,425	95,102
Clay #2	21,270	21,659
Tufa	9,237	9,223
Gypsum	22,310	23,393
Total	916,188	920,631
	Tons Purchased	Tons Used
Iron Cinders	11,916	7,563
Fluorspar	90	98
	12,006	7,661
Total raw materials.....	928,194	928,292

Each raw material listed is identified by the name used by plaintiff in keeping its raw materials pro-

duction records, except that "Clay #2" is identified as "silica" in said raw materials production records. (Stipulation of Facts No. 1, Paragraph V.)

II.

Plaintiff mines gypsum at its quarry located at a distance of approximately 120 miles from its cement plant.

III.

Plaintiff also mines clay, tufa and silica, all of which are mined within 50 miles of its cement plant.

Conclusions of Law

I.

In computing gross income from mining and net income from mining for percentage depletion purposes, plaintiff is not entitled to a percentage depletion allowance for clay, silica, tufa and gypsum under the provisions of Section 114(b)(4) of the Internal Revenue Code of 1939, as amended.

II.

The materials purchased by plaintiff from others as set forth in the findings of fact herein are not subject to depletion allowance by this plaintiff.

III.

Computation of percentage depletion allowance and amount of refund to which plaintiff is entitled in accordance with these findings of fact and conclusions of law are as follows:

Sales Per Return.....		\$8,702,101.
Less: Royalties		133,340.
		<hr/>
Less: Miscellaneous Sales.....		3,201.
		<hr/>
Cement Sales		\$8,565,559.
Less:		
1. Trade discounts	\$ 434,770.26	
2. Trucking—Contract and Own Fleet Costs	815,483.36	
3. Rail Freight	212,558.53	
4. Warehouse and Bulk Storage Plant Costs at Distribution Points.....	49,774.95	
5. Additional Charge for Sales in Bags....	389,350.00	
6. *Purchased Materials	70,665.87	
7. **Materials Mined by Plaintiff but Not Subject to Depletion Allowance	1,378,334.71	
Total Eliminations from Gross Sales.....		\$3,350,937.
Gross Income from Mining.....		\$5,214,621.

Statutory Depletion:

10% of Gross Income from Mining.....		\$521,462.
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Gross Income from Mining

(See Above)		\$5,214,621.
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Mining Expenses	\$7,689,687.54	
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Less:

1. Trade Discounts	\$ 434,770.26
2. Trucking Costs—Contracts and Own Fleet.....	815,483.36
3. Rail Freight	212,558.53
4. Warehouse and Bulk Storage Plant Costs at Distribution Points.	49,774.95
5. Cost of Bags and Bag- ging Expenses	771,119.85
6. *Purchased Materials	63,439.92
7. **Materials Mined by Plaintiff but not Sub- ject to Depletion Al- lowance	1,237,392.99

Total Eliminations	\$3,584,539.86
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allowable Mining Expense.....	4,105,147.68
Net Income from Mining.....	<u>\$1,109,474.12</u>
Depletion Allowable:	
Depletion—10% of Gross Income from Mining.....	<u>\$ 521,462.18</u>
Limitations:	
50% of Net Mining Income	<u>\$ 554,737.06</u>
Allowable Depletion Deduction	<u>\$ 521,462.18</u>
Computation of Refund—Year 1951:	
Taxable Income Per Prior Revenue Agent's Report	\$780,744.09
Additional Depletion Allowable:	
Allowable Depletion Computed Herein.....	\$521,462.18
Allowed Per Prior Revenue Agent's Report....	<u>109,244.28</u>
Additional Depletion Allowable.....	<u>412,217.90</u>
Revised Taxable Income.....	<u>\$368,526.19</u>
Tax Computation	
Revised Taxable Income (above).....	\$368,526.19
Less: Capital Gains.....	8,785.16
Revised Ordinary Income.....	<u>\$359,741.03</u>
Less Thereon, 50.75% Less \$5,500.00.....	\$177,068.57
Less on Capital Gains, 25%.....	2,196.29
Adjustment for Partially Tax Exempt Interest...	(138.89)
Revised Tax	<u>\$179,125.97</u>
Refund Due	
Less Per Prior Revenue Agent's Report.....	\$388,326.56
Revised Tax (See Above).....	<u>179,125.97</u>

Refund Due	\$209,200.
Plus Assessed Interest (367.79 + 382.48).....	750.
Total Refund Plus Assessed Interest.....	\$209,950.8

Notes

*Purchased Materials:

	Tons Used
Iron Cinders	7,563
Fluorspar	98
Purchased Materials Used.....	7,661
Total Tonnage Used.....	928,292

Ratio Purchased Materials Used to Total Tonnage Used:

$7,661 \div 928,292 = .825\%$

Total Sales $\$8,565,559.48 \times .825 = \$70,665.8$

This amount is eliminated from depletable sales as being minerals not mined by taxpayer but purchased, hence not subject to depletion by plaintiff but subject to depletion by other mine owners or mine operators.

**Materials Mined by Plaintiff but not Subject to Depletion Allowance:

	Tons Used
Clay 1	95,102
Clay #2	21,659
Tufa	9,223
Gypsum	23,393
Non-Depletable Tonnage Used.....	149,377
Total Tonnage Used	928,292

Ratio Non-depletable Tonnage

Used to Total Tonnage Used . . . 16.09159%

Total Sales:

\$8,565,559.48 x .1609159 = \$1,378,334.71

****Materials Mined by Plaintiff but not Subject to Depletion Allowance:**

These minerals are not subject to depletion, hence the portion of the total selling price of bulk cement that is attributable to these non-depletable minerals is eliminated as the code does not provide for depletion on sales of these minerals.

Eliminate From Expense:

Total Expense \$7,689,687.54

Eliminated:

Same ratio of .825% used to eliminate expense as was used in Sales Elimination. See explanation as to sales.

Purchased Materials:

.825% x \$7,689,687.54 = \$63,439.92

This is portion of total expense applicable to purchased material and is eliminated from total expense.

Mined but not Depletable Minerals:

Same ratio as used to eliminate sales 16.09159%

16.09159% x \$7,689,687.54 = \$1,237,392.99

This is portion of total expense that is attributable to non-depletable minerals mined by taxpayer and is eliminated from total expense.

Dated: April 9, 1958.

LAUGHLIN E. WATERS,
United States Attorney;

EDWARD R. McHALE,
Assistant United States At-
torney, Chief, Tax Division;

JOHN G. MESSER,
Assistant United States At-
torney;

/s/ JOHN G. MESSER,
Attorneys for Defendants.

[Endorsed]: Filed April 9, 1958.

[Title of District Court and Cause.]

ORDER DENYING DEFENDANT'S MOTION
TO AMEND DEFENDANT'S PROPOSED
FINDINGS OF FACT AND CONCLUSIONS
OF LAW IN ACCORDANCE WITH DE-
FENDANT'S PROPOSED AMENDMENTS
FILED ON APRIL 9, 1958

This cause came on for hearing on April 14, 1958, before the Honorable William C. Mathes, Judge Presiding, for the settlement of findings of fact and conclusions of law and the defendant having moved to amend its proposed findings of fact and conclusions of law lodged with the clerk on April 4, 1958, in accordance with defendant's proposed amendments filed April 9, 1958;

It is found that defendant's motion to amend its proposed findings of fact and conclusions of law lodged with the clerk on April 4, 1958, in accordance with its proposed amendments filed April 9, 1958, is both untimely and without merit. Therefore,

It Is Ordered that the defendant's motion is denied.

Done in Open Court April 14, 1958.

/s/ WM. C. MATHES,

United States District Judge.

Receipt of copy acknowledged.

Lodged April 17, 1958.

[Endorsed]: Filed April 24, 1958.

United States District Court for the Southern
District of California, Central Division

No. 20256—WM Civil

MONOLITH PORTLAND CEMENT COMPANY,
a Corporation,

Plaintiff,

vs.

UNITED STATES OF AMERICA and R. A.
RIDDELL, Etc.,

Defendants.

FINDINGS OF FACT, CONCLUSIONS OF
LAW AND JUDGMENT

This cause came for trial on March 21, 1958, before the Honorable William C. Mathes, Judge, presiding, without the intervention of a jury. Plaintiff was represented by its counsel, Enright & Elliott and J. Howard Elliott, by Joseph T. Enright, and defendants United States of America and Robert A. Riddell, District Director of Internal Revenue, Los Angeles District, were represented by their counsel, Laughlin E. Waters, United States Attorney, Southern District of California; Edward R. McHale, Assistant United States Attorney, Chief, Tax Division; John G. Messer, Assistant United States Attorney; and Gerard J. O'Brien, Assistant United States Attorney, Department of Justice, Washington, D. C. The Court having heard and considered all the evidence, stipulations of facts, exhibits, memoranda and argument of

counsel, makes the following findings of fact and conclusions of law: [482]

Findings of Fact

I.

During all times herein mentioned, the plaintiff, Monolith Portland Cement Company, a Nevada corporation, was and now is a corporation duly qualified to conduct, and is conducting, business in the State of California, with its principal office in the City of Los Angeles, State of California.

II.

This is an action for refund of corporation income taxes for the year 1951. The taxes herein involved were paid by plaintiff to Robert A. Riddell, District Director of Internal Revenue, Los Angeles District, Los Angeles, California.

III.

During the entire year 1951 plaintiff mined a calcium carbonate rock generally known as "limestone," which it processed by the usual and customary process steps applied in the cement industry to obtain any of the various types of Portland cement. Said processes were applied by plaintiff at its cement plant at Monolith, California, adjacent to the quarry from which plaintiff mines the limestone. The process of heating or calcining of the materials used by plaintiff caused chemical changes to occur in them to obtain cement.

IV.

At the completion of the processes referred to above, the cement was stored in silos from which it was loaded and shipped in bulk; or from which it was bagged and loaded and shipped in bags.

V.

The actual computed average high and low chemical analysis, made approximately each week, of the material mined by plaintiff during the year 1951 revealed a high of 87.68% calcium carbonate and a low of 82.45% calcium carbonate, or an average of 85.20% of calcium carbonate. The calcium carbonate content of plaintiff's limestone involved in this case was not high enough to qualify the material as "chemical grade limestone" within the meaning of Section 114(b)(4)(A)(iii) of the Internal Revenue Code of 1939, as amended. [483]

VI.

The only product sold by plaintiff during the year 1951 as a result of its limestone mining operations was Portland cement in bulk and in bag or sack containers.

VII.

The plaintiff pays royalties for the limestone which it mines and uses in making its Portland cement.

VIII.

Plaintiff stores its bulk cement in silos at its cement plant and also at bulk storage distribution points away from its cement plant.

IX.

During the year 1951, 63.49% of plaintiff's cement sales were of bulk cement. The remaining sales were of cement placed in bag or sack containers.

X.

In the principal marketing area served by plaintiff, the market for limestone such as plaintiff mined at its quarry was negligible unless it was processed to obtain cement.

XI.

The commercially marketable mineral product obtained by plaintiff from mining during the year 1951 was bulk Portland cement at its plant at Monolith, California.

XII.

The cost of bags and sack containers and the costs attributable to bagging and sacking are not ordinary treatment processes normally applied by mine owners or operators to obtain the commercially marketable mineral product Portland cement in bulk form.

XIII.

The additional charge made by plaintiff on its sales of Portland cement sold in containers is to be eliminated from its [484] gross sales in order to arrive at "gross income from mining." Also to be eliminated from gross sales are royalties, trade discounts, contract trucking and own fleet trucking costs, rail freight, and warehouse and bulk storage

plant costs at distribution points away from plaintiff's cement plant.

XIV.

In computing net income from mining, the following items are to be eliminated from expenses: trade discounts, contract trucking and own fleet trucking costs, rail freight, warehouse and bulk storage plant costs at distribution points away from plaintiff's cement plant, and cost of bags and costs attributable to bagging.

XV.

The computation of statutory depletion allowance for the year 1951 is as follows:

Sales per return	\$8,702,101.20
Less: Royalties	133,340.02
	<hr/>
	\$8,568,761.18
Less: Miscellaneous sales	3,201.70
	<hr/>
Cement sales	\$8,565,559.48
Less:	
1. Trade discounts	\$434,770.26
2. Trucking—contract and own fleet costs	815,483.36
3. Rail freight	212,558.53
4. Warehouse and bulk storage plant costs at distribution points	49,774.95
5. Additional charge for sales in bags	389,350.00
	<hr/>
Total elimination from gross sales	\$1,901,937.10
	<hr/>
Gross income from mining	\$6,663,622.38
	<hr/> <hr/>

XVII.

On March 9, 1955, plaintiff duly filed its claim for refund with defendant setting forth the grounds upon which the refund was claimed and upon which this suit was commenced.

XVIII.

The defendant neither allowed nor disallowed said claim for refund and more than six (6) months elapsed from the time of filing said claim for refund to the time of filing this suit on July 27, 1956.

XIX.

No part of the sum claimed by plaintiff has been credited, remitted or paid to the plaintiff or to any one on its account. Plaintiff was, and now is, the owner of said claim for refund and has not assigned or transferred said claim or any part thereof to others.

XX.

During the year 1951, plaintiff maintained its books and records on the accrual basis of accounting and filed its return on the calendar year basis.

XXI.

Plaintiff timely filed its income tax return for the year 1951 and, based upon the Regulations of the Commissioner of Internal Revenue, computed its depletion allowance deduction which resulted in a reported income tax liability, as shown on said return, in the sum of \$384,411.65, plus an interest

liability in the sum of \$382.49. Thereafter, in the year 1953, defendant caused said return to be audited, and assessed a deficiency in tax against plaintiff in the sum of \$3,914.97, plus interest in the sum of \$367.79. The said [487] taxes, deficiency and interest were paid by plaintiff on the following dates and in the following amounts:

March 17, 1952.....	\$126,000.00
June 13, 1952.....	126,000.00
September 16, 1952.....	75,262.55
December 15, 1952.....	57,531.59
February 15, 1954.....	4,282.70
Total	<u>\$389,076.84</u>

XXII.

Counsel for defendant United States of America waived all objections to maintenance of this action by plaintiff against said United States of America in this District upon dismissal of this action against defendant Robert A. Riddell, District Director of Internal Revenue, Los Angeles District.

XXIII.

All conclusions of law which are or are deemed to be findings of fact are hereby found as facts and incorporated herein as findings of fact.

Conclusions of Law

I.

This Court has jurisdiction of the subject matter and of the parties hereto pursuant to Title 28, United States Code, Section 1346(a)(1).

II.

Plaintiff, as mine operator, mined a calcium carbonate rock generally known as "limestone" which it processed to obtain any of the various types of Portland cement.

III.

"Chemical grade limestone" within the meaning of the term as used in Section 114(b)(4)(A)(iii) of the Internal Revenue Code of 1939, as amended, means a limestone which is of a relatively [488] high calcium carbonate content.

IV.

The calcium carbonate rock mined by plaintiff was just a "chemical grade limestone" within the meaning of the statute, and was subject to a percentage depletion allowance of ten (10) per centum within the provisions of Section 114(b)(4)(A)(ii) of the Internal Revenue Code of 1939, as amended.

V.

The commercially marketable mineral product obtained by plaintiff was bulk Portland cement at its plant in Monolith, Calif., located within a distance of fifty (50) miles from the quarry operated by plaintiff.

VI.

Plaintiff is entitled to a depletion allowance at the rate hereinabove set forth on its gross sales of bulk cement f.o.b. its plant at Monolith, California,

but adjusted for the items as set forth in the findings of fact herein and limited to fifty (50) per centum of the net income from mining as adjusted for the items as set forth in the findings of fact herein.

VII.

Bagging and costs attributable to bagging are not ordinary treatment processes normally applied by mine owners or operators in order to obtain the commercially marketable mineral product bulk Portland cement.

VIII.

Plaintiff is entitled to refund of income taxes for the year 1951 based on a percentage depletion allowance, as computed in the findings of fact herein, in the amount of \$628,820.89.

IX.

Based on the percentage depletion allowance set forth above, plaintiff is entitled to refund of income taxes for the year 1951 in the amount of \$264,435.41, with interest thereon at the rate of six (6) per centum per annum as provided by law, from the following [489] dates and upon the following portions of this amount:

March 17, 1952.....	\$ 1,358.57
June 13, 1952.....	126,000.00
September 16, 1952.....	75,262.55
December 15, 1952.....	57,531.59
February 15, 1954.....	4,282.70
	<hr/>
	\$264,435.41
	<hr/> <hr/>

X.

The items of royalties, trade discounts, trucking (contract and own fleet costs), rail freight, warehouse and bulk storage plant costs at distribution points away from plaintiff's cement plant, additional charge for sales in bags, costs of bags and bagging expense are to be eliminated from gross sales from mining and from net income from mining as set forth in the findings of fact herein.

XI.

All findings of fact which are deemed to be conclusions of law are hereby incorporated in these conclusions of law.

Judgment

In accordance with the foregoing findings of fact and conclusions of law, it is hereby ordered, adjudged and decreed:

(1) That this action be, and hereby is, dismissed as to defendant, Robert A. Riddell, District Director of Internal Revenue, Los Angeles District, without prejudice to the plaintiff to maintain this action against defendant United States of America within this District;

(2) That plaintiff, Monolith Portland Cement Company, a Corporation, do have and recover judgment against the defendant, United States of America, in the sum of \$264,435.41, plus interest

thereon, as provided by law, from the dates of payment thereof by [490] plaintiff.

Dated: This 14th day of April, 1958.

/s/ WM. C. MATHES,
United States District Judge.

Lodged April 4, 1958.

[Endorsed]: Filed and entered April 14, [491] 1958.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To the Defendant, United States of America and to Its Attorneys, Laughlin E. Waters, United States Attorney; Edward R. McHale, Assistant United States Attorney, Chief Tax Division, and John G. Messer, Assistant United States Attorney:

You and Each of You Are Hereby Notified that Monolith Portland Cement Company, plaintiff herein, does hereby appeal to the United States Court of Appeals for the Ninth Circuit from such portion of the Order and Final Judgment (page 9, 11. 22-23) entered and docketed in this action on the 14th day of April, 1958, as recites that such judgment is based upon the Court's Findings of Fact and Conclusions of Law, in that insofar as such

judgment is purportedly based upon Findings V and XVI and Conclusion III and IV of the Court's Findings of Fact and Conclusions of Law, finding that the calcium carbonate rock mined by plaintiff was not "chemical grade limestone" within the meaning of Section 114(b)(4)(A)(iii) of the Internal [492] Revenue Code of 1939 as amended, the court erred in that such findings and conclusions are:

1. A misapplication of Section 114(b)(4)(A)(iii) of the Internal Revenue Code of 1939;

2. Prejudicial to plaintiff because they may deprive plaintiff of its right to have the quality of its limestone in future years determined under the then applicable law.

Dated: May 16, 1958.

ENRIGHT & ELLIOTT,

By /s/ NORMAN ELLIOTT,
Attorneys for Plaintiff Monolith Portland Cement
Company.

Affidavit of service by mail attached.

[Endorsed]: Filed May 16, 1958. [493]

[Title of District Court and Cause.]

NOTICE OF APPEAL

To the Above-Named Plaintiff and to Its Attorneys,
Enright & Elliott, 541 South Spring Street, Los
Angeles 13, California:

You, and Each of You, Are Hereby Notified That
the defendant, United States of America, does
hereby appeal to the United States Court of Ap-
peals for the Ninth Circuit from the judgment in
favor of plaintiff and against defendant entered in
the Civil Docket April 14, 1958, in the above-entitled
action.

Dated: June 10, 1958.

LAUGHLIN E. WATERS,
United States Attorney;

EDWARD R. McHALE
Assistant United States At-
torney, Chief, Tax Division;

JOHN G. MESSER,
Assistant United States
Attorney;

/s/ JOHN G. MESSER,
Attorneys for Defendant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed June 10, 1958. [497]

In the United States District Court, Southern
District of California, Central Division

No. 20256-WM Civil

MONOLITH PORTLAND CEMENT COMPANY,
a Corporation,

Plaintiff,

vs.

UNITED STATES OF AMERICA and R. A.
RIDDELL, District Director of Internal Rev-
enue, Los Angeles District,

Defendants.

Honorable William C. Mathes, Judge Presiding.

REPORTER'S TRANSCRIPT
OF PROCEEDINGS

Friday, March 21, 1958

Appearances:

For the Plaintiff:

ENRIGHT & ELLIOTT, by
JOSEPH T. ENRIGHT, ESQ.,
WILLIAM B. BETZ, ESQ., and
NORMAN ELLIOTT, ESQ.

For the Defendants:

LAUGHLIN E. WATERS,
United States Attorney;

EDWARD R. McHALE,

Assistant United States Attorney,
Chief, Tax Division; by

JOHN G. MESSER,

Assistant United States Attorney; and

GERARD O'BRIEN,

Special Attorney, Attorney General's
Office.

* * *

WILLIAM E. NEUHAUSER

called as a witness on behalf of the plaintiff, being
first sworn, was examined and testified as [50*] fol-
lows:

* * *

Direct Examination

By Mr. Enright:

* * *

Q. Directing your attention to Exhibit No. 29 for
identification, from what source did you obtain the
items set forth on page 29 of Exhibit No. 29?

A. What page was that?

Q. Page 1 of Exhibit No. 29.

A. Most of these figures came from the revenue
agent's report.

Q. What else did you do in order to ascertain
the figures set forth on page 1 of Exhibit No. 29?

A. Page 1 is a computation of the amount of re-
fund due.

Q. Yes.

(Testimony of William E. Neuhauser.)

A. The figures were obtained from the revenue agent's report, and the other figures are the results of our arithmetical computations that we made.

Q. Now, in order to make those arithmetical computations did you make a computation to exclude bags and bagging operation from the original claim and the original return and the agent's audit?

A. Yes.

Q. Will you proceed to state what page of your report the exclusion of bags and bagging is set [55] forth?

A. I believe that is shown on the second page.

Q. Explain how you arrived and made the computation. Explain how you made the computation to exclude bags and bagging, that operation.

A. Well, we first determined from the company records the number of barrels of bagged cement that were sold in 1951. We also determined, through inspection of price lists and discussions with company officials that 40 cents a barrel was added to the selling price of cement when it was sold in bag form.

We multiplied this 40 cents a barrel by the number of barrels of bagged cement that were sold in 1951, and thus arrived at the sales price, additional sales price of bagged cement, which is shown on this statement as \$389,350.

Q. And that is contained on page 2, being Note (1)?

A. That's correct.

Q. Page 3, rather?

A. Yes, page 3.

Q. What was the next step you made to arithmetically exclude bags and bagging?

(Testimony of William E. Neuhauser.)

A. Having excluded the income, bagging income, we determined what the bagging expense was. I determined that by finding from the company records the actual cost of bags used in 1951; and we determined that the cost of the company's bag and load department, which includes the bagging [56] operation, was \$467,564.61.

We discussed with the people in——

Mr. O'Brien: May I have that figure again, please?

The Witness: \$467,564.61.

Mr. O'Brien: Thank you.

The Witness: We discussed with the company officials, who were in the best position to know, the operations of the company's bagging and loading department, what portion of that figure would properly represent the cost of bagging cement.

We were also supplied with certain statistical data worked up by the company which determined the labor hours spent in that department on loading bulk cement as opposed to sack cement.

The resulting percentage, which we determined then to be properly the portion of those costs attributable to the bagging operation, was 70 per cent, and when applied to the total cost figure that gave us a cost of \$327,295.23.

We then had the cost of the bags used, the cost of the labor and other costs involved in getting the cement into bags, and we assigned then to the bagging operation a fair portion of the general and adminis-

(Testimony of William E. Neuhauser.)

trative costs and arrived at our total expense attributable to the bagging operation.

Q. (By Mr. Enright): And that total expense is shown on page 3 of the report? [57]

A. Yes.

Q. What is that total expense?

A. \$771,119.85.

Q. Now, we will go back a moment here. Did you ascertain that for the year 1951 the company did not keep departmental breakdown costs of the bagging as distinguished from total pack house costs?

A. That is correct. They did not keep this.

Q. Now, did you ascertain whether or not at a later date the company did commence keeping such records?

A. Yes. The company began keeping such a record in 1957.

Q. And you have checked those records, have you, and their method of being kept?

A. Yes, we have.

Q. As a certified public accountant did you check the practices in connection with the keeping of those records? A. Yes.

Q. Have you made a comparison of the costs kept on this particular item of sacking with the costs that you ascertained by referring to the records of 1951 in the manner in which they were kept and your study and investigation at that time?

Mr. O'Brien: Before we proceed, your Honor, I am not sure that I understand the pertinency of the question. Of [58] course, the year in suit is 1951.

(Testimony of William E. Neuhauser.)

The Court: I assume it's leading to a comparison.

Mr. Enright: That is correct, your Honor.

The Court: A check, probably, of percentages to buttress the testimony he has given as to the year in question.

Mr. Enright. I understand that perhaps there is an issue, and I would like to get it clear at this time.

The Court: In other words, for 1951 it would be an estimate, as the witness has testified to, for some other year when the records were in fact kept. It would be at least an estimate of the higher order. And I assume that you expect to show that they are most consistent, percentagewise.

Mr. Enright: Yes. Percentagewise—in fact, the figure we have here is very conservative. And I might——

The Court: Is there objection on that ground?

Mr. O'Brien: Yes, your Honor. I just wanted to see the pertinency and the line of testimony.

Mr. Enright: I might inquire if we could be furnished during the noon recess the agent's computations, which we understand result in a slight difference in these accounting practices, so that we can study it to find out what this difference is. I understand there is only a few thousand dollars involved.

May we have the agent's report?

Mr. O'Brien: I will discuss that with you at lunch time. [59]

The Court: The objection is overruled.

(Testimony of William E. Neuhauser.)

Q. (By Mr. Enright): What did you find the difference to be, if any, between your estimate and computation for 1951, as you stated you prepared it, with this computation under actual records kept in the due course of business?

A. The records that have been kept in 1957 would indicate that probably the 70 per cent factor was low, and that a greater part of the total costs are attributable to the bagging department.

Q. Than the amounts you have set forth here?

A. Yes.

Q. Now, having ascertained the bagging expense to be \$771,119.85, did you further proceed to compute the refunds to reflect an exclusion of the purchased materials, fluorspar and iron cinders?

A. Yes, we did.

Q. Would you refer us to the page of the report where we may check through that exclusion?

A. Page 3, Note (3) explains how that exclusion was made.

Q. Will you state what you did as a certified public accountant to exclude iron cinders and fluorspar from the refund computation?

A. We determined from the company records the total tons of material that were placed into production in the [60] year 1951. We also determined the tonnage of cinders and fluorspar that were placed into production in that year.

We then determined what percentage the tonnage of cinders and fluorspar bore to the total tonnage, and that gave us a percentage figure which we used

(Testimony of William E. Neuhauser.)

then to eliminate purchased material income and expense.

Q. What did you find the percentage of your fluorspar and iron cinders to be of the total tons of materials used to obtain cement? A. .825%.

Q. Now, having ascertained that percentage figure, did you allocate by that percentage figure, the amount of moneys designated as gross income upon the agents' audit report for the year 1951, or the income tax return of the taxpayer for 1951?

A. Well, Mr. Enright, we had taken the gross income figures shown on the agent's report and had already eliminated from it the income attributable to the bagging operation. We then applied the percentage we had obtained, the .825% to the remaining gross income to arrive at the portion of that gross income attributable to purchased material.

Q. And that is shown on page 2?

A. Yes. It is \$68,553.78.

Q. Leaving the remainder, after exclusion of the bagging as you have stated, and exclusion of this purchased [61] material, fluorspar and iron cinder, leaving the remainder as gross income for computation of the depletion allowance?

A. That's correct.

Q. Now, will you proceed to state how you computed the expenses concerning purchased material, iron cinders and fluorspar?

A. That was done in the same manner. We had

(Testimony of William E. Neuhauser.)

eliminated from the total expenses those expenses attributable to the bagging operation.

Q. That is shown on page 2?

A. Yes. We applied the percentage of .825 to the remaining expenses to arrive at the expenses attributable to purchased material. The remaining expenses were then attributable to mined material.

Q. And the mined material expense of \$6,861,-489.51, as shown in the second column on page 2, was then deducted, was it, from the gross income, to arrive at net income? A. That's correct.

Q. And your next computation was the rate of depletion on gross income, is that correct?

A. Yes.

Q. That was shown to be \$1,216,148.36?

A. Correct.

Q. If the rate were 10 per cent, what would be the allowance for depletion? [62]

A. \$810,765.57.

Q. That you have interlineated in this computation since it was originally prepared, is that correct? A. Yes.

Q. Now, to ascertain depletion allowance subject to the 50 per cent of net income limitation, what did you next do when you originally prepared this computation?

A. Yes. We did ascertain the 50 per cent of net income limitation, which is shown as \$623,083.10.

Q. And what would be the limitation if the rate of depletion were 10 per cent?

A. The same figure.

(Testimony of William E. Neuhauser.)

Q. Referring now to the first page of your report, what is shown there, Mr. Neuhauser?

A. It is showing the refund that would be due the taxpayer under this revised depletion computation which we have just discussed.

Q. And also included is the actual amount of refund after tax rates are applied, is that correct?

A. Yes.

Q. The result of pages 1, 2 and 3 of Exhibit No. 29 for identification, is that bags and bagging income and expenses have excluded and purchased materials, fluorspar and cinders, have been excluded—

A. Yes. [63]

* * *

Q. (By Mr. Enright): Now, Mr. Neuhauser, have you made a computation of the refunds allowable if bagging income and expenses and purchased materials, iron cinders and fluorspar, are included as a part of the depletion allowance computation?

A. Did you say "are included"?

Q. Are included, yes, sir.

A. Yes. [67]

Q. Where is that computation?

A. We have added it to this computation on page 2; the first column on page 2 which says "Claim for Refund."

Q. I want you to consider my question.

Let me ask you another question: It is my belief that the original claim for refund, as filed, included the bagging and included the purchased material,

(Testimony of William E. Neuhauser.)

iron cinders and fluorspar, as being subject to depletion. A. Yes.

Q. Well, then, that computation would be in the original claim? A. Yes.

Mr. Enright: The original claim is in evidence already, counsel, as a part of Exhibit No. 5.

Q. (By Mr. Enright): Now, have you made a computation of the depletion allowance if bagging is included and purchased materials are included?

A. Yes.

Q. You have prepared such a report, have you?

A. Yes, there is such a computation.

The Court: Does the record show that "purchased materials" refers to the materials heretofore mentioned?

Mr. Enright: I will ask the witness.

Q. (By Mr. Enright): The "purchased materials" referred to in Exhibit No. 29 are iron cinders and fluorspar? [68] A. Yes.

The Court: That's true in each instance that you refer to it?

The Witness: Yes.

Q. (By Mr. Enright): In each instance in your entire testimony that is true? A. Yes.

Q. Now, have you the computation whereby bagging is included and purchased materials, iron cinders and fluorspar, are excluded?

A. No, I do not.

Mr. Enright: I ask that this document be marked next in order for identification.

The Court: It will be so marked.

(Testimony of William E. Neuhauser.)

The Clerk: Plaintiff's Exhibit No. 30, your Honor.

(The exhibit referred to was marked Plaintiff's Exhibit 30 for identification.)

Q. (By Mr. Enright): Was Exhibit No. 30 prepared under your supervision and direction, or by yourself?

A. It was prepared under my supervision and direction.

Q. What did you find the amount of depletion allowance to be at a 15 per cent of gross income rate? A. \$1,274,069.03.

Q. And 50 per cent of net income limitation would result in what amount? [69]

A. \$433,772.97.

Q. Now, on this Exhibit No. 30 have you proceeded to run out the revised refund payable as has been done on Exhibit No. 29? A. Yes.

Mr. Enright: I wish to offer Exhibit No. 30 in evidence as being another computation of a possible method of allowing depletion in this case.

The Court: The computations on Exhibit 30, as I understand it, excludes purchased material?

Mr. Enright: That would exclude purchased material.

The Court: That's iron cinders and fluorspar.

Mr. Enright: That is correct. Our objective is to place these figures before the court.

The Court: But including bagging.

Mr. Enright: But they include bagging.

(Testimony of William E. Neuhauser.)

The Court: Any objection?

Mr. O'Brien: No objection, your Honor.

The Court: Received in evidence.

(The exhibit referred to, marked Plaintiff's Exhibit 30, was received in evidence.)

Q. (By Mr. Enright): Now, can you by reference to Exhibit No. 29 compute the amount of depletion allowable if bagging is excluded and purchased materials are included?

A. Yes. That has been set forth on Exhibit No. 29. [70]

Q. Will you direct us to which page that is set forth?

A. The second page. The fourth column of figures from the left.

Q. That is at a 10 per cent rate—

A. \$817,620.95.

Q. And mathematically we can ascertain the 15 per cent rate on the gross income? A. Yes.

Q. What would be the net income limitation effect upon the depletion and the amount of depletion? A. \$628,820.89.

Q. And those are the figures that you have inserted in longhand on Exhibit No. 29?

A. That is correct.

Mr. O'Brien: Off the record, please.

(Discussion between counsel off the record.)

Q. (By Mr. Enright): Now, the net effect of excluding bagging and including iron cinders and

(Testimony of William E. Neuhauser.)

purchased materials is that the allowable refund is approximately some \$5,000 higher, is that right?

A. That is correct.

Q. And the amount of the refunded figure, for the record, would be what on this last——

A. I am sorry, Mr. Enright. Did you say the allowable [71] refund would be \$5,000 higher?

Q. Directing your attention to the point of excluding or including the purchased materials, iron cinders and fluorspar.

A. Yes.

Q. Dependent upon what the decision of the court, or anyone may be on that question of inclusion or exclusion, there is approximately \$5,000 difference in tax depletion allowance?

A. That's correct.

The Court: Some \$5,000 greater if the cost of purchased materials is excluded? Is that it?

Mr. Enright: Less if it is excluded; greater if it is included.

Am I correct?

The Witness: Yes. That is correct.

Mr. Enright: We can point out the figures at the appropriate time.

The Court: This is addition to cost?

Mr. Enright: We will explain it this way, by directing the court's attention to Exhibit No. 29.

The Court: Yes. As I understand, these iron cinders and fluorspar are purchased just like the bags and bagging is purchased.

Mr. Enright: Yes. And the way they are handled is this, [72] that the percentage of iron cinders

(Testimony of William E. Neuhauser.)

and fluorspar to total materials is ascertained. It was found to be .825 per cent.

The Court: I am not referring to the amount. I am just referring to what I understood you to say, that the opposite result is reached from excluding purchased materials than is reached when you exclude the bags and bagging.

Exclude the bags and bagging and the refund goes up. If you exclude the purchased materials it goes down. Is that it?

Mr. Enright: Yes. I think that is correct, and it arises out of this point that I was just going to——

The Court: Well, I just want to be sure that I understand the testimony as it comes in. It just struck me as being inconsistent.

Mr. Enright: I know. Nine per cent of the receipts has a different per cent than nine per cent of the expenses. That's where one's mind——

The Court: Well, wouldn't it have the same effect on bags and bagging as it would on purchased materials?

Mr. Enright: Well, it did not.

That is all on direct examination.

The Court: Any cross-examination of Mr. Neuhauser?

Mr. O'Brien: Yes, your Honor, I would [73] like to.

(Testimony of William E. Neuhauser.)

Cross-Examination

By Mr. O'Brien:

* * *

Q. On page 3 of Exhibit 29 you have "purchased material" listed there, and the tons used for cinders and fluorspar. And then I notice that under sub-note (2) you have "cost of bags used." And the amount is \$344,917.73.

I was curious to know why the cost of bags, being a purchased item, was used, and the cost of cinders and fluorspar, being a purchased item, was not used?

A. We made the computations under instructions to compute the expense of purchased material in this manner. [76] Our understanding from the attorneys was that this was the method used in the Dragon case, and this was the computation we were to make.

I might say that, and I believe it was in 1954 where there was no claim for refund, we did make a computation and determine the actual cost of purchased material, and that increased depletion allowance.

Q. And here you have used a tonnage ratio.

A. That's right.

Q. Of tons mined, tons purchased of raw materials.

A. Yes, that is correct.

Q. Does the 40 cent figure represent the cost of the bag alone?

A. The 40 cent figure is the amount added to the sale prices of cement when it is sold in bags. [77]

* * *

(Testimony of William E. Neuhauser.)

Cross-Examination

(Continued)

By Mr. O'Brien:

Q. Mr. Neuhasuer, directing your attention once again to the purchased material item and the mined material item that appears on page 3 of Exhibit No. 29. Do you know what the mined material item covers?

A. What the mined material item covers?

Q. Yes, sir.

A. Yes. The principal item is the limestone, Clay—I can't recall the others.

Q. Would the other be silica?

A. Silica. [81]

Q. If the clay was not allowed a percentage depletion allowance, do you believe it would be correct to exclude the clay from the mined material, which is here allowed, or presumed to be allowed, in the percentage allowance?

Mr. Enright: To which objection is made on the ground that it calls for a conclusion of law by this witness. The facts pertaining to that subject matter are the subject matter of a stipulation.

Mr. O'Brien: Your Honor, I am not asking for a conclusion of law. I said if clay is not allowed any percentage depletion, is it proper to include the clay within the mined material.

The Court: Well, it calls for his opinion, doesn't it?

(Testimony of William E. Neuhauser.)

Mr. O'Brien: Yes, sir. He has included it and if——

The Court: Well, what you are asking him, isn't it, is whether or not he didn't include it upon the assumption that it was allowable? Isn't that what you mean?

Mr. O'Brien: Yes, your Honor.

The Court: In that form I think it's admissible. He is an expert. You can test what assumptions he predicated his opinion upon.

Q. (By Mr. O'Brien): Will you please answer the question on the basis of your assumption?

The Witness: Will you restate it, please?

The Court: Including the clay, the cost of mining clay, [82] did you do that upon the assumption that there was a depletion allowance for clay?

The Witness: No. It was done under the direction of—that this was the method to be used, and this was the method used under the Dragon case.

The Court: As I understand, Mr. Neuhauser, you followed the method of computation which had been adopted in the Dragon case. Is that it?

The Witness: Yes, sir.

Mr. O'Brien: Well, you don't know whether you followed it or not, I understand——

The Court: That is his understanding.

Q. (By Mr. O'Brien): You were instructed that you were? A. Yes.

Q. Now, I am also going to ask you, as an expert witness in accounting matters and as a certified public accountant, one who works in the tax depart-

(Testimony of William E. Neuhauser.)

ment of Arthur Andersen, if the clay is not entitled to a depletion allowance, do you, in your expert opinion, believe it should be included in the mined materials that you have on your page 3 of Exhibit No. 29?

Mr. Enright: May we have the question re-read?

The Court: I don't see why you want to take up any time on that. If it isn't entitled to be included, it shouldn't be included, Mr. O'Brien. [83]

Mr. O'Brien: Thank you, your Honor. That's my conclusion, also. And I believe that the witness would affirm that.

The Court: Now, Mr. Neuhauser, as I understand it, according to his own understanding, followed the method which was employed in the Dragon case. Is that it?

The Witness: That's correct.

The Court: And if that's erroneous, why, his computation is erroneous.

And I am sure you would concede that, would you not?

The Witness: Yes.

Mr. O'Brien: Thank you. [84]

* * *

Q. Now, in setting up the 40 cents did you inquire as to what the 40 cents represented so far as the costs were concerned for bag cement?

A. What it represented as far as the cost of bag cement?

(Testimony of William E. Neuhauser.)

Q. Yes.

A. I am not sure I understand that. This is the additional charge for bag cement per barrel?

Q. Yes, sir.

A. I assume that is charged to recover costs.

The Court: You mean to recover administrative expense?

Mr. O'Brien: I wanted to find out if——

The Court: Referring to direct costs?

Mr. O'Brien: Direct costs, yes.

The Court: Did you understand that the 40 cent item—40 cents per barrel, wasn't it?

The Witness: Yes.

The Court: ——for bagging covered not only the direct cost of the bags but was an allocation of overhead?

The Witness: Well, ordinarily you wouldn't set the price in that manner. Competition pretty much determines what you charge. And, of course, you hope what you charge covers [87] all your costs and produces a profit.

Q. (By Mr. O'Brien): Well, here the 40 cents did not cover the costs. A. That is correct.

Q. Now, do you happen to know what the additional costs are?

A. You mean the cost that it does not cover?

Q. Yes, approximately.

A. In dollar amounts?

Q. Yes. A. \$381,769.85.

The Court: For what year?

The Witness: 1951.

(Testimony of William E. Neuhauser.)

The Court: That cost in fact as against cost estimated, would that reflect itself in the net earnings?

The Witness: Oh, yes.

The Court: It would be otherwise reflected.

The Witness: Yes.

The Court: This is just an arbitrary apportionment, this 40 cents, isn't it?

The Witness: Well, again, the 40 cents is the amount added to the sales price of a barrel of cement when it is sold in sack form instead of in bulk form.

Q. (By Mr. O'Brien): But the 40 cents is not intended to cover the cost, as you understand it, because of the loss [88] which is recorded here in the amount you have stated for the year 1951?

Mr. Enright: I will object to his understanding. What the facts are is what is competent, relevant evidence.

The Court: Is there any evidence on it?

The evidence is that it did not cover the cost.

Mr. Enright: Yes. And that is reflected——

The Court: Are you asking him whether he understood it, did cover the cost in making his computation, Mr. O'Brien? Is that your question?

Mr. O'Brien: Yes.

Q. (By Mr. O'Brien): In making up the computation you understood that the 40 cents did not cover the cost of bagged cement.

A. The computation showed that it did not.

The Court: The question is, when you made the computation did you understand that 40 cents did cover it?

(Testimony of William E. Neuhauser.)

The Witness: I had no understanding until we made the computations and found out they did not.

The Court: When you were making the computation did you assume that it did?

The Witness: Your Honor, I didn't make any assumption. I computed it and found out that it didn't.

The Court: Anything further?

Mr. O'Brien: Yes, your Honor. [89]

Q. (By Mr. O'Brien): Did you examine the books and records to determine if the 40 cent figure was a constant charge for the bagged cement?

A. Yes, we examined the books and records.

Q. They did not vary for the year that you examined? A. Not to my knowledge.

Q. And what years do you recall that you examined?

A. Well, we looked at a price list. And I have—I don't recall exactly what year that covered. And we also discussed it with the individual that had been in charge of this pricing in all of the years, 1951 through 1954. And it was his statement to us that this has been a constant practice during this period.

Q. Now, would you say that the bagged cement sales ending up with a loss of operation for the year 1951 of over \$380,000, that that loss had to be covered or carried by the sales of cement in bulk?

Mr. Enright: To which objection is made as incompetent, irrelevant and immaterial as to where the loss is covered or carried.

(Testimony of William E. Neuhauser.)

The Court: What difference does it make? The depletion is not computed on net profit, is it?

Mr. O'Brien: We are computing it here on net income, your Honor, 50 per cent of net income, or 10 per cent, the Government claims, of gross. [90]

The Court: Still, wouldn't it be immaterial? It would reflect itself somewhere, wouldn't it?

Mr. O'Brien: Well, that is what I wanted to find out, where else it should reflect itself.

The Court: Well, can you tell us, Mr. Neuhauser?

The Witness: You say where else it should reflect itself?

Mr. O'Brien: Yes.

The Witness: I don't understand what you mean.

The Court: Well, in breaking it down, if you allocate 40 cents to the cost of bagging and it is insufficient, it doesn't cover the actual expense of bagging, where would the differential appear in the records of the company.

Is that your company?

Mr. O'Brien: Yes, your Honor.

Mr. Enright: To which objection is made is this: That the statute is, depletion from the property and the property is defined as "mining." And the method of computation is the processed steps in the mining.

And he is asking about "Where are you going to carry a loss, in some other range operation, oxide operation, or any other thing the corporation does?" It's immaterial.

(Testimony of William E. Neuhauser.)

The Court: Well, it might not be material. It depends on whether or not that is included in the mining operation. Isn't that the determinant? He has to determine that first, [91] we haven't determined that. Overruled.

Mr. Enright: That is for the court, as a matter of law, to determine, not for the accountant to determine whether he is going to put this bagging some place else, loss or receipt.

The Government's position has been—it seems to be—that the whole bagging receipt and expense be excluded as a matter of law. We stand on that position.

The Court: What? On the 40 cent basis or the actual basis?

Mr. Enright: Both the 40 cent receipt and the actual expense are to be excluded. That we understand to be the Government's position. We agree with them. It has nothing to do with the mining, under this statute.

Mr. O'Brien: The taxpayer wants the Government to assume that its accounting methods are consistent with the mining operation. Now, a taxpayer, with Exhibit——

The Court: Do you contend that bags and bagging should be included?

Mr. O'Brien: Your Honor, I am only trying to inquire——

The Court: No. Answer that question, and then we can talk. I am not interested in some academic theory. I am interested in the real controversy.

(Testimony of William E. Neuhauser.)

If the Government doesn't contend that this should be included, if you are both agreed upon it, let's drop the [92] subject.

Mr. O'Brien: Well, in principle, the Government would agree with the theory——

The Court: All right. Let's drop the subject. Step down, Mr. Neuhauser. Call your next witness. Let's move on.

Unless you have something more?

Mr. O'Brien: Well, if the witness would stay here for a second, your Honor, and let me please try to explain the problem as we see it.

We have an over-all operation of this cement business, where the loss on the bagging operation, taxpayer wants to exclude as non-mining cost all of the costs on the non-mining cost basis. Therefore, he is increasing his percentage depletion allowance by eliminating this cost.

The Court: Yes. But you are agreeing with him.

Mr. O'Brien: In principle.

The Court: If you dispute it, why, then let's talk about it. There is something to talk about. But if you agree with him, let's move on to something else.

Mr. O'Brien: Well, in principle, your Honor, yes. But is it not a valid point of inquiry to determine if it is not in truth the bulk sale of cement which is carrying the balance of this loss which they are attributing to bagging.

Therefore, if the bulk commodity is carrying part of this cost, if this is non-mining cost, it should come out [93] from under the cost——

(Testimony of William E. Neuhauser.)

The Court: Well, I assume, Mr. O'Brien, if you agree with Mr. Enright you will add whatever the loss is onto what would otherwise be the net profit figure, and then there is no dispute between you.

Of course, if it came out of something else and it changed the figures, if there was disagreement between you on it I could see some basis. Unless you are going to dispute the net profit figures on some other ground.

Mr. O'Brien: That is what I am trying to determine, your Honor. I think that there is a dispute between us on a net profit figure that they have arrived at.

The Court: But is it because of this bag and bagging expense? As I understand it, they got 40 cents per barrel of cement for bagging, bags and bagging. It cost a great deal more than that. They have estimated what that cost is.

Do you dispute the 40 cents?

Mr. O'Brien: No, your Honor.

The Court: Do you dispute their estimate of how much it cost them more than 40 cents?

Mr. O'Brien: No, your Honor.

The Court: Well, then, what is there to argue?

Mr. O'Brien: I want to try to determine if it is not true that the price they charged for the bulk cement includes a certain amount of money to cover the loss on the bagging [94] operation which is not covered by the sale of the bagged cement.

The Court: Well, now, what difference would

(Testimony of William E. Neuhauser.)

it make? It might make a lot of difference to the customer of bulk cement.

Mr. O'Brien: That's right.

The Court: But it wouldn't make any difference to anybody else.

Mr. O'Brien: The customer of bulk cement is carrying, in part, the cost of bag sales.

The Court: All right. He isn't here.

Mr. O'Brien: Pardon?

The Court: He isn't here.

Mr. O'Brien: But might we not argue, as a matter of accounting, under the principle we are advocating here, that the portion of the income from the sales of bulk cement which is intended to cover the balance of the loss operation on bag sales should be excluded from their gross income on bulk sales?

In other words, what is the real price of bulk cement.

The Court: Would it make any difference here? It would be six of one and half a dozen of another, wouldn't it?

Mr. O'Brien: It would make a substantial difference.

The Court: When it comes to computing net profit.

Mr. O'Brien: It would make a substantial difference, [95] your Honor, because they are taking out all of the balance of the loss.

The Court: And you agreed to it.

Mr. O'Brien: And we want them to take part.

(Testimony of William E. Neuhauser.)

We want them to take the balance of that loss from the bulk cost.

The Court: What difference does it make? Isn't it just six of one and half a dozen of another?

Mr. O'Brien: As a practical matter, your Honor, it makes a difference in the amount of their depletion allowance. It reduces it, your Honor, the depletion allowance.

The Court: I don't see how it could. It wouldn't change the net profit figure, would it?

Mr. O'Brien: Yes.

The Court: How could it? I am assuming you have agreed to the method of eliminating not only the 40 cent income but also eliminating the entire cost of bags and bagging. It's just taken out of the picture, the profit picture just the same as if it never happened, isn't it?

Mr. O'Brien: Well, maybe we don't agree that the entire cost of bagging, the operation of bagging which is the cost of loading cement in bags, should be taken out.

The Court: Well, are we taking up all this time over some question you want to ask him?

Mr. O'Brien: Pardon me?

The Court: You say maybe you don't agree. Don't you [96] know?

Mr. O'Brien: Well, we are trying to explore through an expert, a certified public accountant, if he thinks, as a matter of accounting procedure, if it isn't true that the bulk price for cement necessarily has an included differential to cover the loss.

(Testimony of William E. Neuhauser.)

The Court: You mean consciously included, or consciously or unconsciously?

Mr. O'Brien: It would have to be consciously included.

The Court: Do you know whether the company added anything to the price of bulk cement to make up for this loss of bags and bagging?

The Witness: No.

Q. (By Mr. O'Brien): Is there any way of determining from their books and records whether they added anything to the price of bulk cement?

A. I don't think so.

Q. Would it be a legitimate method of accounting to take out from the price of bulk cement that amount of money which would cover the loss operation, the balance of the loss operation on bagged cement?

Mr. Enright: I will object to what is legitimate method of accounting practice.

The Court: Well, he means proper accounting practice.

Do you understand the question? [97]

The Witness: No.

The Court: I didn't understand it, either. But I thought perhaps Mr. Neuhauser did.

Q. (By Mr. O'Brien): In proper accounting practices, how would you arrive at the amount of money which is charged for bulk sales that is intended to cover the balance of the loss operation on bagged sales which is not covered by the price of bagged cement?

(Testimony of William E. Neuhauser.)

A. I would determine from the client's records and discussions with the client if there is any addition to the price of bulk cement which is intended to cover such loss. If I establish that there is such an addition, then there must be evidence of it on the records and it will be easily determinable.

Q. Do you think, within accounting procedures, that it would be proper if the client asked you to set it up as a method on their books, what portion of the bulk price would be allocated to cover the loss, and how would you do that?

A. Well, if we were accounting, Mr. O'Brien, for departments and profitability of departments, I wouldn't take the income of one department and apply it against the loss of another department. The purposes of departmental accounting would be to see what departments are producing income and what departments are producing a loss. So, I [98] wouldn't ordinarily be doing what you suggest, apparently, taking the income of one department and applying it against the loss of another department.

Q. Would that not be proper procedure for accounting then? A. No.

Q. It could be done, but you wouldn't recommend doing it? A. No, I wouldn't

The Court: He said, according to his opinion, it is not proper accounting practice, as I understand it. Is that correct?

The Witness: That is correct.

WALDO A. GILLETTE

called as a witness by the plaintiffs, being first sworn, was examined and testified as follows:

The Clerk: What is your full name, please?

The Witness: Waldo, W-a-l-d-o, A. Gillette, G-i-l-e-t-t-e.

Direct Examination

By Mr. Enright. [102]

* * *

Q. Can you state what was the practice in 1951 of these cement companies with which Monolith competed concerning price differential, if any, between bulk cement on the one hand and sack cement on the other hand?

A. The price of sack cement was 40 cents a barrel above the price of bulk.

Q. Does this Exhibit No. 32 reflect that differential, plus the freight rate differential, at the various, destinations, insofar as there was freight rate differential, between sack cement and bulk cement?

A. Yes.

Mr. Enright: I wish to offer in evidence Exhibit No. 32.

The Court: Any objection?

Mr. O'Brien: No objection, your Honor. [107]

The Court: Received in evidence.

(The exhibit referred to marked Plaintiff's Exhibit 32, was received in evidence.)

Mr. Enright: Counsel has stipulated—I will attempt to state it accurately—that I may read from a portion of the Riverside Cement Company price

(Testimony of Waldo A. Gillette.)

list which bears the date, May 15, 1950. And that portion is as follows:

“Prices for Portland cement in bulk will be 40 cents per barrel below the prices for such type of Portland Cement in paper sacks.”

Q. (By Mr. Enright): Now, directing your attention, Mr. Gillette, to what I have just read concerning the Riverside price list, is that the competition that Monolith Company met or attempted to meet in marketing its product in Southern California?

A. That is correct.

The Court: By that you mean that Monolith couldn't charge more than 40 cents per bag and bagging per barrel because your competitors did not charge more than that?

The Witness: That's right. We can't get any more for our cement than anybody else can.

Q. (By Mr. Enright): Now, directing your attention to the Riverside Cement Company plant at Crestmore, California, Riverside County, do you know whether or not its freight rates published under the authority of the Public Utilities [108] Commission and Interstate Commerce Commission are any different from the freight rates from Monolith to Los Angeles metropolitan area?

A. Yes, they are.

Q. What is the difference? Not in dollars or cents, but are they higher or lower?

A. The rates from Riverside are lower than from Monolith.

Q. What is the approximate mileage from Crest-

(Testimony of Waldo A. Gillette.)

more, California, on the one hand, to the Los Angeles metropolitan area and Monolith, California, on the other hand, to the Los Angeles area?

A. Riverside is approximately 57 miles, and Monolith is approximately 116 miles.

Q. That is both rail and truck, or highway miles?

A. Those are the rail mileages. The highway mileages are approximately the same as that.

Q. Now, in addition to the Riverside Cement Company's plant at Crestmore, is there another cement plant closer, in closer proximity to the Los Angeles market than the Monolith plant?

A. Yes, there is a plant at Colton, California, owned and operated by the California Portland Cement Company.

Q. And it is just a few miles from the Crestmore plant of the Riverside Cement Company? [109]

A. Yes, it is. And approximately the same mileage to Los Angeles.

Q. Does the California Portland Cement Company at Colton enjoy an equality of freight rate structure with the Crestmore plant in the Los Angeles market? A. Yes.

Q. What is the principal consuming market for the marketing of Portland cement, either in sacks or bulk, so far as the cement plants in Southern California are concerned?

A. The Los Angeles area. [110]

MONTHLY PAY-RAND QUANT Co-1952
 Exhibit B - Computation of Profitable Allowance

	Dinner	Over	Grass	Total
	Meats	Chickens	Blacks	Meats
	Cost	Cost	Cost	Cost
Limestone	17083743	108746	1675249	17971498
* Clay	698674	102833	75749	792277
T-5-F4	2488493	28545	313774	2677008
Shish	267468	37074	36267	307749
* G-12-10	106474	-	106474	106474
Total	24452323	1728072	19182210	24252515
Total Mine Car	1388743			
without Expense	1664074			
By Mine Cost	1427074			
Total				

Expense mine is separate operation in and then located with its own equipment with the exception of several small expenses.

The Tapped Expense follows on clay on the basis of Mine Mine 10-10-10. In that way will be necessary to carry my factoring, it is a symmetrical curve produced for on diplo. The expense has become satisfactory evidence that the clay mining being approx 20% on the different tests by various elements. experience in this matter, but; Revenue Mine 10-10-10 has been raised by Revenue Mine 10-10-10.

In view of the above, 50-50 follows that in determining the percentage depletion payable to clay the fact that it is not the same as the other clay will be considered a necessary fact. It is necessary to use on 50% basis. Such is not the case. Depletion and to depletion is allowed on the mine or clay.

Company	Initial Expense	Net Mine Expense	Shareholder	SP	SP	SP
Expense	Expense	Expense	Expense	Expense	Expense	Expense
12301591	12301591	12301591	12301591	12301591	12301591	12301591
678394	678394	678394	678394	678394	678394	678394
16694	16694	16694	16694	16694	16694	16694
44948	44948	44948	44948	44948	44948	44948
116312	116312	116312	116312	116312	116312	116312
162079	162079	162079	162079	162079	162079	162079

Exhibit 6 to Rejoinder of Facts No. 1.
 Received for identification January 23, 1957.

(Testimony of Waldo A. Gillette.)

Cross-Examination

By Mr. O'Brien: [111]

* * *

Q. (By Mr. O'Brien): The principal market that Monolith has is for bulk sales, according to your Exhibit No. 31. Is that true?

A. Yes. In 1957 our shipments were 76.87 per cent bulk.

Q. And for the year 1951?

A. 63.49 per cent bulk.

Q. And what were the percentages for bagged cement [119] for the year 1951?

A. Well, the difference, which would be 36.51 per cent.

Q. And for the year 1957?

A. 23.13 per cent.

Q. For the cement industry that comprises your competitors that you previously described, are your percentages fairly representative of the market conditions?

A. Yes, I think they are. Because if you will note, most of the construction nowadays is furnished by transit mix dealers. Now, your transit mix people receive cement in bulk. And so, all of the cement that is sent by transit mix—all the concrete that is sent by transit mix has been previously shipped to that dealer in bulk. They do it because of the ease of handling, reduction of cost.

And, of course, your labor costs are playing

(Testimony of Waldo A. Gillette.)

quite a factor in it, now. There was a time when we handled things by hand, but it just—nowadays most everything is handled in bulk, as far as you can. [120]

* * *

KENNETH H. PILKENTON

called as a witness on behalf of the plaintiffs, being first sworn, was examined and testified as follows:

The Clerk: Will you state your full name, please?

The Witness: Kenneth H. Pilkenton. [121]

* * *

Cross-Examination

By Mr. O'Brien: [125]

* * *

Q. (By Mr. O'Brien): And with respect to the warehouse operations, would you describe that for us?

A. Monolith Cement Company hauls mostly by rail, bulk cement, down to various distributing centers and then it is reloaded into bulk trucks and then sends it out to the trade. That is a process or expense or service beyond the point of manufacturing the bulk cement. [129]

* * *

The Court: Did you assume that bags and bagging were part of the cost of mining?

(Testimony of Kenneth H. Pilkenton.)

The Witness: I have never thought so, that bags and bagging were a cost of mining. [130]

* * *

The Court: It seems to me that it is just a question as to whether certain items would be included or excluded.

You agreed on the bags and bagging. That can be taken out, can't it?

What about the purchased material, iron cinders and fluorspar?

Mr. O'Brien: Those should be taken out, also, I believe. Or, plaintiff has taken that out of the computation.

The Court: Is that agreed by the plaintiff, that those go out?

Mr. Enright: If that's the only issue, why, I am sure I can agree that they be taken out. In principle I do not think they should be, but if that's the only point the Government has, why——

The Court: I am not suggesting a ruling one way or the other.

As I understand the ruling in these cases, it is that you take X out of the ground and if it's marketable the [141] way it comes out of the ground, why, that's the price, the price at which you market it in that condition. That is what we are interested in. If you have to do something to it to make it marketable, whatever you have to do to it, add to it or change it, whatever the cost of that is goes into the selling price.

Somewhere along the line you can cut off this process and you can market it.

Now, as I understand it, you are in agreement that that can be done short of the bagging of it. So, it's sold on bulk.

As I would understand it, you would take the cost of what it would take to produce that cement and sell it in bulk, and that would be what you would deduct. And, of course, you would deduct it from what you get for it sold in bulk.

That may be an over-simplification, but it seems to me that the result would be the statutory income from the property from mining.

Mr. O'Brien: Yes, your Honor. I believe you are correct in the matter. I don't wish to argue what we have raised here with respect to the loss operations, but——

The Court: It seems to me that you would just lay that completely outside, if you disregard the bags and bagging. [142]

Of course, you may have to do some arithmetical computations to eliminate it. I don't know what the bookkeeping has been. It seems to me that to arrive at this you would start with the sale of it as sale in bulk. That's the gross. And deduct from it the cost of bringing it up and selling it in bulk, whatever that may be. If you have to add iron cinders to it, it seems to me that would be. And fluorspar. Whatever is necessary to make it marketable, a marketable mineral product. [143]

March 24, 1958, 10:50 A.M.

* * *

The Court: The question is, will the bagging stage be included, or is the cut-off point at which the cement becomes [171] marketable short of the bagging stage? And you have agreed that it is. Both sides have agreed that it is.

Mr. O'Brien: Yes.

The Court: And it so happens that by so agreeing in this situation the figures on the books are such that it causes this loss and that it adversely affects the Government when dealing with those figures.

* * *

[Endorsed]: Filed June 25, 1958. [172]

PLAINTIFF'S EXHIBIT No. 3

Exhibit "H"

Los Angeles District
Engineer's Report (Mining)

August 10, 1953.

Taxpayer

Monolith Portland Cement Co.
Los Angeles, Calif.

Address

Manufacturer of cement. Raw products and
plant located in Kern County, California

Authority for examination: 1951 return

	1951
Percentage depletion claimed	\$119,121.37
" " allowed	109,244.28
Depreciation claimed	246,291.74
" " allowed	246,291.74

Depletion for the year involved is determined in accordance with provisions of the Revenue Act of 1951.

Depreciation is allowed at rates claimed they being consistent with those claimed and allowed in settlement of prior years return.

Depletion claimed on the percentage of income basis is allowed in the "costs and proportionate profits" method not on income received from sale of finished cement. Per schedule "A" attached note that calculation is at the rate of 10% of gross computed limerock income, at 5 per cent on clay and tufa (stone) and nothing for silica all subject to the limitation of 50 per cent of net computed income on each. All of the above-stated minerals are used in the manufacture of cement.

Proportionate costs have been broken down into:

(1) Direct and indirect expenses through the raw grind process,

(2) Direct and indirect expenses after the raw grind process in order to eliminate depletion on manufacturing profits.

Further allocation of expenses before and after raw grind has been made with respect to selling and general administrative.

The direct and indirect expenses up to raw grind are shown in detailed cost records by minerals. Direct and indirect expenses of raw grind have been allocated to the four minerals on the ratio of tons of each processed to total tons processed.

Total direct and indirect expenses of \$1,834,624.41 (through raw grind) have been determined to be and allocated:

Limestone	\$1,678,197.61	—	91.47%
Clay	95,732.21	—	5.22%
Tufa	36,264.77	—	1.98%
Silica	24,429.82	—	1.33%
	<hr/>		
	\$1,834,624.41	—	100.00%

Selling and general administrative expense allocations follow the scheme of charging each mineral in the same manner as direct and indirect expense.

Total direct and indirect costs through raw grind—\$1,834,624.41—is 35.74 per cent of the total of all such costs—\$5,131,983.93—through the furnished product. Thus 74.26 per cent of the total cost relates to manufacturing expense, i.e., after raw grind.

Depletion claimed in the amount of \$119,121.37 is allowed at \$109,244.28 the adjustment being through increase made in general and administrative expenses (see Schedule A attached) which decreases net income with the result the 50 per cent limitation on computed limestone net income is affected.

Depletion claimed and allowed on clay and tufa is not affected due to allowance of the 5 per cent gross income rates.

The adjustment in "mining" net income is due to increase in General and Administrative expense by disallowance of other income (interest, etc.) and miscellaneous items which were charged on schedule attached to the return as a reduction of costs. For detail see Schedule B attached.

Cost depletion is not allowed on silica production due to unsubstantiation of a unit rate.

The taxpayer agrees to adjustments noted.

W. W. HANSON,
Valuation Engineer.

Reviewed: 8/18/53

ESB

Approved:

/s/ D. W. WILLIAMS,
Chief, Natural Resources
Section.

Exhibit No. 2 to Stipulation of Facts No. 1.

Received for identification January 23, 1957.

PLAINTIFF'S EXHIBIT No. 14

Uses for Which Chemical Properties
Are Most Important

Cement Manufacture

Limestone is the chief raw material used in making portland cement. Although pure limestone is not required, constancy in chemical composition is desirable. The general requirements are: (1) The stone should be free of concretions rich in iron minerals; (2) the silica and alumina contents should be sufficiently low and in such proportions that they will not interfere with the desired silica-alumina ratio in the finished product; (3) the magnesium content should be low enough that the finished product will not contain more than 5 per cent magnesia (MgO); (4) the content of iron should be low enough that the ferric oxide content of the cement does not exceed 4 per cent; (5) the sulfur content should be low.

Cement rock is an argillaceous limestone that contains enough clay as it occurs in nature to adapt it for the manufacture of cement. Sometimes it may be necessary to adjust its composition by adding small quantities of either high-calcium limestone or clay.

* * *

Few extensive limestone deposits comparable with those in many of the Eastern states occur in California. Most of the deposits in California are

irregular bodies of variable magnesium content. Limestone deposits that are available are used extensively in the more populous areas. Cement manufacture is an important industry, particularly in the Los Angeles area where several large plants operate in San Bernardino, Riverside, Los Angeles, and Kern Counties.

* * *

Exhibit F to Stipulation of Facts No. 2.

Received for identification.

PLAINTIFF'S EXHIBIT No. 15

Rocks composed predominantly of the mineral calcite are called limestone; those in which the mineral dolomite predominates are called rock dolomite or simply dolomite. Pure limestone, which is rare, contains 100 per cent CaCO_3 . Rocks composed of mixtures of calcite and dolomite or rocks composed of carbonate minerals transitional between calcite and dolomite are called magnesian limestones. In general, limestones, dolomites and magnesian limestones cannot be used inter-changeably and economic utility of these rocks must be judged by their chemical and for some uses, physical characteristics. Most commercial limestone contain more than 95 per cent CaCO_3 and less than 5 per cent MgO_2 although rock of lower CaCO_3 content is sometimes used—particularly for portland cement. Limestone containing

more than 95 per cent CaCO_3 is commonly referred to as high-calcium limestone.

* * *

Occurrences of Limestone and Dolomite in California

Most of the limestone and dolomite deposits in California occur in metamorphosed marine sedimentary rocks that have been strongly deformed. Most commonly they are found in rocks of Paleozoic age but there are some commercial deposits in rocks of Mesozoic age and a few are found in pre-Cambrian suites of rocks.

* * *

In many terranes of crystalline metamorphic rocks the carbonate units have been so intimately folded with rocks of non-carbonate nature, such as slate, schist and quartzite that beds which originally would have been of economic value are now too thoroughly intermixed to be profitable to mine.

* * *

Marketing of limestone, dolomite and lime products

Limestone and dolomite are both low-priced commodities which must be produced reasonably near to centers of consumption or transportation costs become prohibitive. With but few exceptions, limestone and dolomite are produced within 150 miles of the consuming center.

* * *

Exhibit G to Stipulation of Facts No. 2.

Received for Identification.

PLAINTIFF'S EXHIBIT No. 23

DEPOSITION OF DR. OLIVER BOWLES

Voir Dire Examination

By Mr. Enright:

Q. Is the word, Chemical Grade Limestone, used in the glass industry, to your knowledge? That phrase, Chemical Grade Limestone. Is it used in the glass industry? A. I don't know.

Q. You don't know? A. No.

Q. Is it used in the paint or whiting business?

A. I am not conversant with the personnel of those industries enough to know how to use the term.

Q. Is it used in the varnish industry. That is, that phrase, Chemical Grade Limestone?

A. I don't know.

Q. Is the term or phrase, Chemical Grade Limestone, used in the paper industry?

A. I don't know whether they use it or not.

Q. Is the phrase, Chemical Grade Limestone, used in the alkali industry?

A. I don't know.

Q. Is the term or phrase, Chemical Grade Limestone, used in the sugar industry?

A. I don't know.

Q. Would your answer be the same as to any industry where limestone is chemically processed? [7*]

A. Yes, my answer would be the same, because I am not conversant with the personalities and

(Deposition of Dr. Oliver Bowles.)

people in that industry. I never heard them talk about such things.

Q. Now, directing your attention to the Bureau of Mines where you spent thirty-five years, was the term, Chemical Grade Limestone used in any of the publications that you offered for the Bureau of Mines?

A. I know I used the term, Chemical and Industrial Uses, quite frequently.

Q. And you used the term, Chemical and Industrial Uses with reference to the use of limestone in the following industries, relating them as to volume of limestone used:

First, cement; second, lime; third, alkali; and approximately seven or eight other similar uses of limestone where it was chemically processed, did you not?

A. I don't think I used that term in that way.

Mr. Enright: I submit there is no qualifications of this witness to testify concerning the use of the phrase, Chemical Grade Limestone. He already testified the only use he made of it is in uses in which the chemical properties of the limestone are important.

Mr. O'Brien: May I continue with the witness?

Mr. Enright: Surely.

(Deposition of Dr. Oliver Bowles.)

Examination by Counsel for the Government
(Continued)

By Mr. O'Brien: [8]

Q. You stated on the qualifying questions of Mr. Enright you were not familiar with the personalities of persons in these various industries he named, as to whether they themselves, used the term, Chemical Grade Limestone. A. Yes.

Q. Yes? A. Yes.

Q. Have you ever heard the term, Chemical Grade Limestone, used in the limestone industry?

A. Do you mean by the producers themselves?

Q. Yes.

A. I cannot recollect at this time, no.

Q. Is the term, Chemical Grade Limestone a term which is unknown to the limestone industry?

Mr. Enright: I submit that this witness is not qualified or competent to draw that conclusion.

Mr. O'Brien: Please answer.

Mr. Enright: There is no foundation laid.

The Witness: It is a term that the industry is well acquainted with, I am sure.

Q. Well, would you explain why you believe that the industry is well acquainted with the term?

A. Because they sell stone to the industries that use the high grade chemical stone, that is required in their processes. [9]

Q. Well, do they grade limestone?

A. Yes.

Q. If the purchaser desired to purchase a chemi-

(Deposition of Dr. Oliver Bowles.)

cal grade limestone, would a producer of limestone generally understand what was meant?

A. I think he would. Yes.

Q. Well, what sort of limestone would be included, then, within the term, Chemical Grade Limestone?

A. As we interpret it, in the Bureau of Mines, a chemical grade limestone is one that is used for chemical uses such as alkali manufacture, calcium carbide manufacture; in the glass, paper, and sugar industries.

Q. How pure should the limestone be for such uses?

A. In general, it means just from 96 to 98 per cent carbonates or even higher ranges, in some instances.

Q. Would you consider a limestone containing about 85 per cent calcium carbonate a chemical limestone?

Mr. Enright: I object.

The Witness: No.

Mr. Enright: Just a minute. I object. I want the record to show, before the answer is given, there is no qualifications shown by this witness to qualify him to state that conclusion that he has just made in response to your question. If you desire to lay any further foundation, I would appreciate your doing it, because at the appropriate [10] time, I will move to strike the answer.

The Witness: May I have that question read?

(Thereupon the pending question was read.)

(Deposition of Dr. Oliver Bowles.)

The Witness: May I answer?

Mr. O'Brien: You have already answered it.

The Witness: No, I have not.

Q. Would you explain why you would not consider a limestone containing 85 per cent calcium carbonate as not a chemical grade limestone?

A. Because it is impure for the uses that I enumerated as constituting what we understand to be the chemical industries.

Q. Would you consider the Portland Cement Manufacturing industry as one of the chemical industries?

Mr. Enright: I further object for the same reason, to the whole line of testimony of this nature. If you desire to lay foundation to qualify the witness, I request you to do so.

The Witness: I would not consider the Portland Cement Industry as a chemical industry, as the term is understood in the Bureau of Mines.

Q. Is there a chemical reaction in the process of cement manufacture?

A. Yes. There is complex chemical reaction which takes place. [16]

* * *

Mr. Enright: Now, perhaps the taxes have a little bit to do with it, would you say? Maybe that is what the witness has in mind in his conclusion.

Q. Are these publications looked upon as authoritative publications by the industry from your knowledge of the vast number of years you have been in this field?

(Deposition of Dr. Oliver Bowles.)

A. I believe they are so recognized. Yes.

Q. Would you consider a limestone used for lime manufacture as a chemical limestone?

A. Yes. I would.

Q. Why would you do so, when you rule out limestone for cement manufacture?

A. Because limestone used for lime manufacture is generally, or almost invariably, a very high grade. A large part of the lime manufactured in the United States is made from stone running more than 98 per cent calcium carbonate. In fact, the lime itself is a very important chemical raw material.

Q. And you state chemical raw material. Do you mean as used by the chemical trades?

A. Yes. It is used extensively in making glass, paper manufacture, sugar manufacture.

Q. What ratio of purity must there exist in the limestone to make a chemical grade lime? [17]

* * *

The Witness: Well, I might amplify it to this extent, to say that limestone itself is not used for treating sewage and trade waste. Lime made from limestone is so used, and therefore, taxpayer's limestone could not be used for such a purpose because it is not suitable for making lime.

Q. The lime industry is one of the recognized chemical trades? A. Yes.

Q. What about the use of limestone by leather manufacturers?

A. That requires a high calcium stone.

Q. Could taxpayer's limestone be used by leather

(Deposition of Dr. Oliver Bowles.)

manufacturers? A. No. No.

Q. Could taxpayer's limestone be used for water purification?

A. There again, it is not stone that is used. It is a lime that is used. Therefore, the taxpayer's stone could not be used in water purification.

Q. Could taxpayer's limestone be used in petroleum refining?

A. No. That requires a high calcium stone.

Q. Do you think any of these industries, despite what you have here testified as the View of the Bureau of Mines, would still use taxpayer's limestone in any of these categories?

A. I cannot answer that. We covered that all in detail. I cannot give you an overall answer because I think there are one or two there, in which they could use it. [26]

* * *

Q. I will refer to your own views. I think they are quite qualified.

Mr. Enright: That is this witness' own personal views.

The Witness: Well, my views are based on thirty-five years' experience with the industry, which neither the secretary nor the Director of the Mines have had and my conclusion would be that the taxpayer's limestone is not useable in the chemical industries as I have defined them.

Q. Do you know of any other authoritative industries or government publications that would classify the cement industry as one of the chemical trades?

(Deposition of Dr. Oliver Bowles.)

A. No. I don't know of any such publication.

Mr. Enright: I assume he refers to the trades you just previously defined?

The Witness: Yes.

Q. Would you please explain the processes for the preparation of limestone for cement manufacture?

A. Well, the limestone is crushed and ground to a fine powder. It is properly proportioned with clay and other additions to make a suitable mixture.

Q. And what is the next step after you obtain the [27] suitable mixture?

A. These finely ground materials are calcined in a rotary kiln. During the process, complex reactions take place, forming calcium silicates; calcium aluminates; ferrites; and other compounds. The limestone is entirely changed into these products. The material comes from the kilns in small lumps called clinker, which we grind to a powder.

Q. I show you Stipulation of Facts No. 1 entered into by the parties, and filed with the Court where, in Paragraph IV, it narrates the steps in the preparation and physical proportioning of the raw materials. And I would like to have you state if you agree with that. Is that paragraph accurate according to your information of the cement industry?

A. According to my understanding, that statement is correct.

Q. Would the processes of crushing, grinding, and screening prepare the limestone for use in a marketable form? A. Yes.

(Deposition of Dr. Oliver Bowles.)

Q. What are the marketable forms for limestone in the United States, generally?

A. Well, it is sold as a crushed stone, screened to various sizes in larger masses called rip-rap or pulverized to a fine powder.

Q. Are you placing pulverized limestone in the category [28] of a stone? A. Yes. [29]

* * *

Q. That is under the general classification, uncalcine, [54] isn't that correct, in your own statement there, of 1927?

A. That is a principal classification.

Mr. O'Brien: Is there any objection to having the witness read into the record, for the benefit of the Court, what it is he is referring to and what you are referring to?

Mr. Enright: None whatsoever.

Mr. O'Brien: Would you please read it in the record?

The Witness: I thought it was in the record already.

Mr. O'Brien: No. The quotation, please.

The Witness: Four general fields of utilization may be outlined for commercial limestone.

1. As uncalcine stone. Dimension stone. Crushed or pulverized stone.

2. As flux or for other metallurgical purposes.

3. In the manufacture of Portland Cement.

4. In the manufacture of lime.

For the first of these uses, the chemical composition of limestone is of little significance, and its

(Deposition of Dr. Oliver Bowles.)

physical properties are of most importance. For fluxing purposes or the manufacture of Portland Cement or lime, the chemical composition of the stone is all important. Its physical properties are secondary.

Q. Now, directing your attention to the commercial [55] use of limestone for flux or metallurgical purposes, physical properties are of importance, in addition to the chemical properties in that instance. Is that correct?

A. No. No. Physical properties are of minor importance for flux or metallurgical purposes. [56]

* * *

Q. When you wrote your text, published by McGraw Hill Company, you treated cement production as the first subject to be discussed under the topic, Uses for Which Chemical Properties Are Most Important, did you not?

A. What page is that?

Q. 385. A. Yes.

Q. You so discuss cement at that time, because it was the most important chemical user of limestone. Isn't that correct, Doctor?

A. Well, I would not word it just that way.

Q. But substantially, that is correct, is it not?

A. It is the most important of the products made from limestone.

Q. Tonnage wise and dollar wise, isn't that correct?

A. I think that is correct. Yes.

Q. And in fact, the chemical reactions occurring

(Deposition of Dr. Oliver Bowles.)

in the kilns are so complicated that the chemists are not quite sure just what the symbols are for the chemical compounds that is formed in the kiln, is that correct?

A. I think that is correct, yes.

Q. Have you read Dr. Bogue's treatise on the subject matter?

A. Yes. I know Dr. Bogue, and I know he has had [60] ten men working for him for the last twenty years on Portland Cement.

Q. He is the authority in the field, is he not?

A. On the process of making cement, yes.

Q. Well, you read and studied his book, *The Chemistry of Portland Cement*, published by the Chemical Publishing Company?

A. Yes. I know his book.

Q. It is a chemistry book, is it not, on cement?

A. Yes, that is right.

Q. Published by a chemical publishing company, isn't that right?

A. It is a chemical reaction, yes.

Q. And it is published—the treatise upon the subject matter—by a chemical publishing company?

A. Yes.

Mr. O'Brien: If he knows. Do you know the publishing company?

The Witness: Yes, I know the Chemical Publishing Company.

Mr. O'Brien: What is the name of it?

The Witness: That is the name of it. Chemical Publishing Company.

(Deposition of Dr. Oliver Bowles.)

Q. And so, Dr. Bogue's predecessor, I believe, was a Dr. Meade, is that right? [61]

A. Meade on Portland Cement. Yes, I know his book, too.

Q. And that is considered the prior authority before Dr. Bogue published his book. Isn't that right?

A. I think so. Yes.

Q. In addition to the Bureau of Mines classifying cement as a mineral product, it is also true that the Bureau of the Census did likewise, during the years 1899 to 1937, is it not?

A. I suppose you are referring to the Census of the Mineral Industry?

Q. Well, I am referring specifically to your own publication in May of 1945.

That is why I carried the date down to 1937, because your writings as of that time is my knowledge on the subject. I have nothing further than that, personally, into the Bureau of Census, but I am endeavoring to develop the subject now through you preliminarily to go in later, if necessary.

If it will refresh your recollection, I will show you a quotation from your publication, U.S. Bureau of Mines, Information Circular 7320, May, 1945, Trends in Consumption and Prices of Chemical Raw Materials in Fertilizers, by Oliver Bowles and Ethel M. Tucker, being a quotation from page two: [62]

"It is difficult to measure the output of the chemical process industry, because some doubt exists as to just what industries should be included. Many

(Deposition of Dr. Oliver Bowles.)

industries not classified strictly as chemical, employ chemical processes. Chemical and metallurgical engineering has presented a table based on Bureau of Census figures for the value of output of the chemical processing industry for select years from 1899 to 1937. These data with the additional figures for the 1937-1939, appear in Table One. Figures for years later than 1939 are unavailable.

“The industries covered are as follows:

“Chemicals. Coke oven products. Drugs and medicines. Perfumes. Cosmetics and toilet preparations. Distilled liquors. Explosives and fire works. Fertilizer. Glass. Clay products and refractories. Pottery porcelain and sand lime brick. Leather panning. Lime and cement.”

I shall not continue to read the additional enumeration, but ask you whether or not that refreshes your recollection as to whether or not lime and cement were included in the chemical industries as stated in this bulletin?

A. Yes. It is included in this classification by the Census, but you will note in the introductory paragraph I qualified it by saying that many industries not classed strictly as chemical, employ chemical processes. [63]

Q. That was your then-thinking on the subject?

A. It is my thinking now.

Q. And you therefore——

A. That is why I classed cement in that group. It does employ chemical processes but that does not make it a chemical industry.

(Deposition of Dr. Oliver Bowles.)

Q. You therefore——

A. As we understand it.

Q. You disagree with the Bureau of Census Classification, do you?

A. I qualified it, yes, in the beginning.

Q. You disagree with it by your qualification. Is that correct?

A. I don't see how I can disagree with it. They include certain industries and they say they are covered.

Q. You also disagree with the Bureau of Mines publication, too, don't you, that I previously enumerated here?

A. No. Not at all. This is simply a list. I cannot agree or disagree with it because they say it is the list they cover. That is correct. I have no disagreement with that. They imply these are all chemical industries, and I qualify that in the preceding statement, that many classed as strictly chemical—not classed strictly as [64] chemical, employ chemical processes. My contention is that the fact that they have a chemical process involved in them does not make them chemical industry, as the Bureau of Mines interprets chemical industries in its use of limestone.

Q. I appreciate your argument, Doctor.

Mr. O'Brien: I object to that. He is giving no argument.

Mr. Enright: I objected earlier to his argument.

Q. You disagree also with Chemical and Metallurgical classification, as stated in this article?

(Deposition of Dr. Oliver Bowles.)

A. No, I cannot say that, because that is the list they say they are considering. They don't say what it is. I cannot disagree with it. They don't say this is what we consider the chemical industries. They don't say so. If they said so, I would disagree with them, but they don't.

Q. They list lime and cement under chemicals. Read it again. Here. You wrote the article—caused it to be published by the Bureau of Mines. I assume I am correct. You were the author of it. And the Bureau of Mines published it—the Government Printing Office.

A. No. Looking at that wording, I do not agree with it, and I have so said in the preceding paragraph.

Q. Thank you; and you do not agree with Chemical and Metallurgical Engineering?

A. As calling these chemical processes. [65]

* * *

Q. Have you made a study of the subject matter at any time during your experience?

A. Well, I have read a great deal about the solubility of limestone.

Q. (By Mr. Enright): I would like to check my notes. I believe that is all the questions I have at this time, but I would like to check my notes: if it is convenient, may we have a short recess?

Mr. O'Brien: We will take a short recess.

(Brief recess.)

Mr. O'Brien: On the record.

(Deposition of Dr. Oliver Bowles.)

Mr. Enright: There is one other subject here that I believe I covered in my examination and it pertains to a statement appearing at page 399 and 400 of your publication, *The Stone Industry*, published by McGraw Hill in 1939. If you wish, I will read the statement, or if you desire, you read the paragraph commencing at the bottom of 399, ending on page 400, at the top. I will read it.

“Few extensive limestone deposits comparable with those in many of the eastern states occur in California. Most of them are irregular ventricular bodies of variable magnesia content. Mining or quarrying problems are often difficult, and many deposits are far from markets.

Numerous comparatively small areas of shelly compact or crystalline limestones are cropping in many [80] counties, supplying the chief raw materials for important cement and lime industries, but various igneous rocks are used more widely than limestone as sources of crushed stone.”

Now, directing your attention to the last clause, various igneous rocks are used more widely than limestone, as sources of crushed stone, do you have that statement in mind?

The Witness: Yes.

Q. (By Mr. Enright): That is true today, is it not?

A. I believe it is.

Q. Thank you.

Mr. Enright: I have no further questions.

(Deposition of Dr. Oliver Bowles.)

Further Examination by Counsel for Government
By Mr. O'Brien:

Q. Continuing where Mr. Enright left off there, I would like to have the record read that, continuing on page 400, Dr. Bowles states in his book: "Nevertheless, crushed and pulverized limestones are utilized in many ways, including stone for concrete aggregate, road construction, railroad ballast, flux, refractories, glass and sugar manufacture, agricultural use, roofing gravel, terrazzo, chicken grit, whiting, and whiting substitute. Both the extreme northern part of California and the desert regions in the south, have large deposits of limestone in the more populous parts of the state but owing to distance for market [81] and inadequate transportation facilities, they have little or no commercial value.

Lime and crushed limestone products sold in California in 1929 were valued at over \$1,100,000 and cement nearly \$23 million. In 1932, the figures were, respectively, \$775,000 and \$8,485,000.00."

Mr. Enright: That is tons, is it not, there, at the last? Not dollars?

Mr. O'Brien: No. Dollars.

Mr. Enright: Perhaps we should have the Doctor geographically define southern California for the purposes of his statement there in that [82] book.

* * *

[Endorsed]: Filed March 21, 1957.

PLAINTIFF'S EXHIBIT No. 29

Monolith Portland Cement Company

Computation of Allowable Depletion
For the Calendar Year 1951

Computation of Refund:

Revised taxable income—

Taxable income, per revenue agent's report.....\$780,744.09

Additional depletion—

Percentage depletion, per revenue

agent's report\$109,244.28

Revised percentage depletion

(statement attached) (623,083.10) (513,838.82)

Revised taxable income\$266,905.27

Refund due—

Tax, per revenue agent's report.....\$388,326.56

Revised tax—see below 127,553.36

Refund due\$260,773.20

Tax Computation:

Revised taxable income\$266,905.27

Less—Capital gains 8,785.16

Revised ordinary income\$258,120.11

Tax thereon, 50.75% - \$5,500.00\$125,495.96

Tax on capital gains, 25% 2,196.29

Adjustment for partially tax exempt interest.... (138.89)

Revised tax\$127,553.36

Received for Identification.

PLAINTIFF'S EXHIBIT No. 31

Statement Showing Shipments in Bulk and Sacks
From Monolith Cement Plant at Monolith, California,
And Per Cent of Each
For the Years 1951 to 1957, Inclusive

Year	Bulk		Sacks		Total
	%	Bbls.	%	Bbls.	
1951	63.49	1,695,392.47	36.51	975,144.75	2,670,537.22
1952	63.87	1,652,222.04	36.13	934,423.25	2,586,645.29
1953	59.27	1,623,071.46	40.73	1,115,231.25	2,738,302.71
1954	63.99	1,853,408.04	36.01	1,043,091.50	2,896,499.54
1955	61.65	1,854,103.41	38.35	1,153,344.00	3,077,447.41
1956	68.01	2,115,531.53	31.99	944,900.00	3,110,431.53
1957	76.87	2,415,211.98	23.13	726,874.25	3,142,086.23
Total.... (6 Years)	65.55	13,208,940.93	34.45	6,943,009.00	20,151,949.93

W.A.G.—3/21

Received for Identification.

PLAINTIFF'S EXHIBIT No. 33

Monolith Portland Cement Company

Computation of Allowable Depletion
For the Calendar Year 1951

Newhauser
3-24-58

Computation of Refund:

Revised taxable income—

Taxable income, per revenue agent's report.....\$780,744.09

Additional depletion—

Percentage depletion, per revenue

agent's report\$109,244.28

Revised percentage depletion..(628,820.89) (519,576.61)

Revised taxable income\$261,167.48

Refund due—

Tax, per revenue agent's report.....\$388,326.56

Revised tax—see below 124,641.43

Refund due \$263,685.13

Tax Computation:

Revised taxable income\$261,167.48

Less—Capital gains 8,785.16

Revised ordinary income\$252,382.32

Tax thereon, 50.75% - \$5,500.00\$122,584.03

Tax on capital gains, 25% 2,196.29

Adjustment for partially tax exempt interest.... (138.89)

Revised tax\$124,641.43

Received in evidence March 24, 1958.

[Title of District Court and Cause.]

CERTIFICATE BY CLERK

I, John A. Childress, Clerk of the above-entitled Court, hereby certify that the items listed below constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in the above-entitled case:

A. The foregoing pages numbered 1 to 498, inclusive, containing the original:

Complaint.

Answer.

Stipulation extending time to file "Memorandum of Law" required in Paragraph 4 of Order for Pre-Trial.

Statement re Pre-Trial Order Item 6:
11/30/56.

Pre-trial Law and Citation Memorandum:
11/30/56.

Pre-Trial Memorandum for the Defendants.
Stipulation of Facts No. 1.

Order continuing Pre-Trial hearing, filed
12/4/56.

Request for hearing of ex parte matter, filed
12/4/56.

First Request for Admissions.

Supplement to Pre-Trial Law and Citation
Memorandum, 1/23/57.

Objections to and Statement in Response to
Plaintiff's First Request for Admissions.

Minute Order 1/28/57 re pretrial hearing.

Minute Order 3/13/57 re continuance pre-
trial hearing.

Plaintiff's Opening Memo per 1/28/57 pre-
trial direction.

Stipulation of Facts No. 2.

Supplemental pre-trial Memorandum for De-
fendants.

Application for extension of time re filing
Briefs.

Plaintiff's Closing Pre-Trial Memo per
1/28/57 pre-trial direction.

Request for Admissions and Interrogatories.

Request for hearing of ex parte matter, filed
5/9/57.

Order continuing pre-trial hearing.

Answer to Request for Admissions.

Answer to Interrogatories.

Minute Order 5/9/57 re continuance of pre-trial conference.

Request for hearing ex parte matter, filed 6/19/57.

Order re Pre-Trial Memorandum.

Copy of Opinion of U.S. Court of Appeals for First Circuit in Case 5186 Dragon Cement Co. v. U.S.A.

Request for Admissions 6/28/57.

Answer to Request for Admissions.

Minute Order 6/19/57 re filing of copy of Opinion in Case 5186 Dragon Cement Co. v. U.S.A., District of Maine.

Stipulation of Facts No. 3.

Minute Order 7/22/57 re pre-trial conference.

Minute Order 8/2/57 re trial.

Stipulation continuing hearing for Oral Argument, filed 12/6/57.

Stipulation continuing hearing for Oral Argument, filed 1/13/58.

Notice of Motion and Motion to file Supplement to Complaint.

Points and Authorities in support of Motion to file Supplement to Complaint.

Stipulation re Motion and Continuance of Hearing for Oral Argument and Order.

Affidavit of Bill B. Betz, in re 3/17/58 hearing.

Request for hearing ex parte matter, filed 3/28/58.

Order granting additional time to file objec-

tions to proposed Findings of Fact, Conclusions of Law and Judgment.

Minute Order 3/17/58 re oral argument.

Minute Order 3/21/58 re trial.

Amendment to Complaint.

Answer to Supplement to Complaint.

Minute Order 3/24/58 re further trial.

Findings of Fact, Conclusions of Law and Judgment, filed 4/14/58, but not signed by Court (Plaintiff's).

Minute Order 3/27/58 re additional time to prepare objections to proposed findings and judgment.

Exceptions to Defendant's Proposed Findings and Conclusions of Law.

Answer to Amended Complaint.

Defendant's proposed Amendments to proposed Findings of Fact and Conclusions of Law Lodged by Defendant on 4/4/58.

Defendant's Memorandum re Defendant's Proposed Amendments to Defendant's Proposed Findings of Facts and Conclusions of Law lodged on 4/4/58.

Objections and Notice (plaintiff).

Clerk's copy of Notice of Entry of Order for election as between defendants and dismissal of defendant Robert A. Riddell, etc., and judgment.

Exceptions, Points and Authorities of April 12, 1958.

Affidavit of Gerard J. O'Brien.

Order denying Defendant's Motion to Amend Defendant's proposed Findings of Fact, and

Conclusions of Law in accordance with Defendant's Proposed Amendments filed on 4/9/58.

Minute Order 4/11/58 re placing on calendar hearing on objections to Findings and Conclusions.

Minute Order 4/14/58 re hearing on objections to proposed findings, etc.

Order for election as between Defendants and for Dismissal of Defendant Robert A. Ridell, etc.

Findings of Fact, Conclusions of Law and Judgment, entered 4/14/58.

Plaintiff's Notice of Appeal.

Designation of contents of record on appeal.

Defendant's Notice of Appeal.

B. Plaintiff's Exhibits 1 to 33, inclusive.

C. Eight volumes of Reporter's Official Transcript of Proceedings had on:

1/28/57; 7/22/57; 8/2/57; 3/17/58; 3/21/58; 3/24/58; 3/27/58 and 4/14/58.

I further certify that my fee for preparing the foregoing record, amounting to \$2.80, has been paid by appellant.

Dated: June 26, 1958.

[Seal] JOHN A. CHILDRESS,
Clerk;

By /s/ WM. A. WHITE,
Deputy Clerk.

[Endorsed]: No. 16063. United States Court of Appeals for the Ninth Circuit. Monolith Portland Cement Company, a Corporation, Appellant, vs. United States of America, Appellee. United States of America, Appellant, vs. Monolith Portland Cement Company, a Corporation, Appellee. Transcript of Record. Appeals from the United States District Court for the Southern District of California, Central Division.

Filed and Docketed: June 28, 1958.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 16063

MONOLITH PORTLAND CEMENT COMPANY,
a Corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

UNITED STATES OF AMERICA,

Appellant,

vs.

MONOLITH PORTLAND CEMENT COMPANY,
a Corporation,

Appellee.

STATEMENT OF POINTS
ON APPEAL

In accordance with its Notice of Appeal, appellant Monolith Portland Cement Company submits for determination the question:

Whether the Court below erred in fact or in law in holding that the limestone produced and used by appellant in the year 1951, was not "chemical grade limestone" under Section 114(b)(4)(A)(iii) of the Internal Revenue Code of 1939, as amended.

Dated: July 9, 1958.

Respectfully submitted,

ENRIGHT, ELLIOTT & BETZ,
JOSEPH T. ENRIGHT,
NORMAN ELLIOTT,
BILL B. BETZ,

By /s/ NORMAN ELLIOTT,
Attys. for Appellant, Monolith
Portland Cement Company.

Affidavit of service by mail attached.

[Endorsed]: Filed July 11, 1958.

[Title of Court of Appeals and Cause.]

STATEMENT OF POINTS UPON WHICH
CROSS-APPELLANT, UNITED STATES
OF AMERICA, INTENDS TO RELY ON
CROSS-APPEAL

[Court of Appeals Rule 17.6]

Comes Now the cross-appellant, United States of America, and states that it relies in its cross-appeal upon the points stated in its designation of points on cross-appeal filed in the District Court.

Dated: August 5, 1958.

LAUGHLIN E. WATERS,
United States Attorney;

EDWARD R. McHALE,
Assistant United States At-
torney, Chief, Tax Division;

JOHN G. MESSER,
Assistant United States
Attorney;

/s/ JOHN G. MESSER,
Attorneys for Appellee and
Cross-Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed August 11, 1958.

At a Stated Term, to wit: The October Term
A.D. 1959, of the United States Court of Ap-
peals for the Ninth Circuit, held in the Court
Room thereof, in the City of Los Angeles, in
the State of California, on Monday, the third
day of November, in the year of our Lord, one
thousand nine hundred and fifty-eight.

Present: Honorable Richard H. Chambers, Circuit
Judge, Presiding,

Honorable Stanley N. Barnes, Circuit
Judge,

Honorable Frederick G. Hamley, Circuit
Judge.

[Title of Cause.]

ORDER ON MOTIONS

On consideration whereof, it is now here ordered and adjudged by this Court, that the motion of Appellant, Monolith Portland Cement Company to vacate order of the District Court extending time to docket cause on appeal be, and hereby is denied as moot.

It is further ordered that the stipulation for consideration of original exhibits and reporter's transcript without reproduction in printed transcript, be and hereby is approved by the Court as constituted.

(November 3, 1958.)